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RECORD, CASE No. 14,120.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 160.

WOOLSEY WELLES, A. K. WELLES, AND WILLIAM B. WELLES, JR., TRUSTEES, PLAINTIFFS IN ERROR,

vs.

GEORGE CRANE, ADMINISTRATOR OF THE ESTATE OF EDWARD K. GOODNOW, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED AUGUST 30, 1890.

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a Pleas before the supreme court of Iowa in a cause therein tried and determined between Edward K. Goodnow against Woolsey Welles and others.

Be it remembered that on the 31st day of October, 1884, there was filed in the office of the clerk of the supreme court of Iowa an abstract of record, the same, with endorsements thereon, being in the words and figures following, to wit:

1 (Endorsed: "It is hereby stipulated by the att'ys for pl'ff and def't- that this cause shall be submitted to and tried by the court upon this abstract as amended. Dated Dec. 9, 1884. Geo. Crane, att'y for pl'ff; Theo. Hawley, def'ts' att'y.")

In the Supreme Court of Iowa, December Term, 1884.

EDWARD K. GOODNOW
vs.
WOOLSEY WELLES & Others. } In Equity.

Appeal from Webster district court.

Theo. Hawley, for appellants; George Crane, for appellees.

Appellant's Abstract of Record.

On the 5th day of August, 1876, there was filed in the office of the clerk of the circuit court of Webster county Iowa, the petition of the plaintiff in the words and figures following to wit:

The said Edward K. Goodnow, plaintiff herein, respectfully represents unto this court that the Iowa Homestead Company is a corporation duly organized and existing under and by virtue of the laws of the State of Iowa. That in or about the year A. D. 1863, the said homestead company received from the Dubuque and Sioux City Railroad Company, a corporation also existing under
2 and by virtue of the laws of Iowa, a deed duly signed, executed and delivered by said railroad company, purporting to convey in fee simple absolute to the said homestead company the following-described real estate: That is to say, all of section thirty-three (33), township eighty-nine (89), range twenty-eight (28), N. ½ of N. W. ¼ and E. ½ of S. W. ¼ section eleven (11), township eighty-seven (87), range twenty-seven (27.)

N. ½ section nine (9), township eighty-seven (87), range twenty-eight (28), S. W. ¼ of N. W. ¼ and W. ½ of S. W. ¼ section three (3), township eighty-eight (88), range twenty-seven (27), all of section eleven (11), all of section twenty-five (25), all of section thirteen (13), and S. ½ of section twenty-three (23), all of section seventeen (17), township eighty-eight (88), range twenty-nine (29), E. ½ and S. W. ¼ section one (1), N. E. ¼ section three (3), S. W. ¼ section eleven (11), E. ½ and N. W. ¼ section thirteen (13), S. ½ of S. W. ¼ and S. W. ¼ of S. E. ¼ section fifteen (15), W. ½ of N. E. ¼ and N. W. ¼ & S. ½

section nineteen (19), E. ½ N. W. ¼ and N. E. ¼ section twenty-one (21), S. E. ¼ & N. E. ¼ and N. ½ S. E. ¼ section twenty-three (23), E. ½ S. W. ¼ of section twenty-five (25), all of section twenty-nine (29), all of section thirty-one (31), S. W. ¼ section thirty-three (33), all of section thirty-five (35) (except E. ½ N. E. ¼) all in township eighty-eight (88), range twenty-eight (28), in Webster county, a copy of which deed marked Exhibit "A" is hereto annexed and made a part of this petition.

2d. Plaintiff further avers that from and after the execution and delivery of said deed as aforesaid, until the year A. D. 1873, the said homestead company honestly and in good faith believed it was the absolute owner of and held a good and valid title to the lands aforesaid, but in the year A. D. 1873, the Supreme Court of the United States in a suit therein pending for the purpose of testing the right and title of said homestead company to said land, decided finally that said company was not the owner thereof and never had any right or title thereto, since which time the said company has not claimed to be the owner of said lands.

3 3d. Plaintiff further avers that during the continuation of such belief and claim of ownership, the said homestead company gave or delivered over to Webster county, a municipal corration organized and existing under the laws of the State of Iowa, and within whose territorial limits said lands are situated, the taxes duly assessed and levied by said county upon said lands, that is to say, the following amounts for the following years respectively:

For the year 1863	8766 42
For the year 1864	1,299 30
For the year 1865	1,574 45
For the year 1866	931 63
For the year 1867	1,110 75
For the year 1868	1,455 55
For the year 1869	1,455 55
For the year 1870	1,687 85
For the year 1871	1,963 45

4th. Plaintiff further avers that the taxes so assessed and levied by said county upon and against said lands became and were a valid and binding lien thereon in favor of said county, which said lien was paramount to all other liens or incumbrances thereon. That long prior to the assessment and levy of said taxes upon said lands, the said William B. Welles, defendant herein, became and was the real owner thereof, and ever since has been such owner, but of the said defendant's said ownership the said homestead company had no knowledge or notice at the time of receiving its deed therefor, nor until about the year A. D. 1873, and long after the payment of said taxes.

5th. Plaintiff further avers that said defendant has never paid to said county the taxes aforesaid or any part or parcel thereof.

6th. Plaintiff further avers that said county has always hitherto refused and still refuses to refund to the said Iowa Homestead Company or its assigns the taxes so given or delivered over to the said

county by said homestead company as hereinbefore alleged, and said county has always hitherto refused and still refuses to
4 take any steps whatever to collect the aforesaid taxes from the said defendant, or any part thereof or to enforce the lien given by law upon said lands to secure the due payment thereof.

7th. Plaintiff further avers that said county has the legal right and power and is in duty bound to collect the taxes aforesaid from the defendant who was the legal owner of said lands at the time said taxes were levied against the same and was justly bound to pay the said taxes to said county.

8th. Plaintiff further avers that the said Iowa Homestead Company has assigned, transferred and set over unto the said plaintiff all right, title, claim, demand or cause of action either in law or equity which said company may have had against said Webster county or any other person on account of or by reason of the payment to said county of the aforesaid taxes, a copy of which assignment is hereto annexed marked Exhibit "B," and made a part of this petition.

Wherefore the plaintiff prays that an account be taken of the amount of taxes that said defendant should pay, and that a decree be entered up against said defendant in the name of the plaintiff or in the name of Webster county for the use and benefit of plaintiff and made a lien upon the lands hereinbefore described. That said lands be ordered to be sold to pay off said decree and that plaintiff have such other and further relief in the premises as equity and good conscience may require and to this court may seem meet.

GEORGE CRANE,
JOHN DOUD, JR.,
Attorneys for Plaintiff.

EXHIBIT "A."

Know all men by these presents that the Dubuque & Sioux City Railroad Company in consideration of one hundred and seven thousand dollars received by them of George J. Forrest, Frederick C. Gebhard and William J. Barney, trustees (of Iowa Homestead Company), have bargained and sold and by these presents do bargain, sell and convey unto the said Geo. J. Forrest, Frederick
5 C. Gebhard, (both of the city of New York), and William J. Barney, (of the city of Chicago, Illinois), trustees as aforesaid, their heirs assigns and other legal representatives forever the following-described lands to wit:

(For description of lands see petition), reserving to said railroad company the right of way across said lands with full and free rights to locate said railroad thereon, to borrow earth stone or gravel for construction and to deposit wash earth thereon when necessary. To have and to hold the said lands to the said George J. Forrest, Frederick C. Gebhard and William J. Barney, trustees, their heirs, assigns and other legal representatives in fee simple absolute forever. The said railroad company will warrant and defend said premises to said grantees, their heirs, assigns and other legal representatives against the lawful claims of all persons whomsoever.

In testimony the president and secretary of said company sign their names this 12th day of November, 1863, and the corporate seal is hereto affixed.

EDWARD STUNSON, *President.*

JAMES M. McKINLEY, *Secretary.*

Afterwards, to wit: on the 2d day of April, 1877, there was filed in the office of the clerk of the circuit court the answer of the defendant, Webster County, in words and figures following:

And now comes said Webster County, a party in the above-entitled cause, and as a substitute for the pleading heretofore filed therein, pleads as follows:

That is to say the said county now comes and claims the benefit of the commencement of this suit by the said plaintiff, and asks a decree or judgment against the said Wm. B. Welles, defendant, as prayed for in plaintiff's said petition.

Said county further says that the taxes mentioned in said petition were duly and legally assessed and levied by said county upon the lands herein mentioned at the time, for the years and amounts, and in the manner and form alleged and set forth in said petition, and that the said taxes at the time of the said several assessment
6 became and were and still are a valid and binding lien upon said lands in favor of said county.

That at the times aforesaid and at the commencement of this suit, the said Wm. B. Welles was the owner in fee of said lands, and was and still is in duty bound to pay said taxes to said county.

That said county further says that said taxes have never been paid nor any part thereof, and that said defendant, Wm. B. Welles, has never paid said taxes to said county or any part thereof; on the contrary the whole thereof are still due to said county from the said defendant.

Wherefore said county asks for a decree or judgment against said defendant, Wm. B. Welles, for the sum of $15,000 and interest thereon, being the amount of taxes due said county as above set forth, and that the same be made a lien upon the lands described in said petition, and that said county have such other and — judgment, order, decree and relief as the court may deem best and agreeable to equity and good conscience.

J. F. DUNCOMBE,
Attorney for Webster County.

And afterward there was filed in the office of the clerk of the circuit court on the 9th day of January, 1877, the demurrer of defendant, Wm. B. Welles, as follows:

Comes now the defendant, Wm. B. Welles, and for his demurrer to the petition of plaintiff say-—

That the facts stated in the petition do not entitle the plaintiff *in* the relief demanded.

THEO. HAWLEY,
Attorney for Defendant Welles.

On the 5th day of April, 1879, plaintiff filed the following amendment to his petition:

EDWARD K. GOODNOW
vs.
WOOLSEY WELLES, A. K. WELLES, and WM. B. WELLES, Trustees Substituted in Place of Wm. B. Welles, Deceased.

7 And now comes the plaintiff, E. K. Goodnow, and by way of amendment and addition to the petition heretofore filed, says that the taxes mentioned in plaintiff's original petition were duly levied and assessed by the said Webster county against the lands of defendant at the times and in the manner and forms therein alleged.

That at the time plaintiff's assignor gave or delivered to said county the taxes aforesaid, it was agreed and understood that the said county should receive or collect the said taxes of and from the said defendant that the said county would repay the taxes so collected to plaintiff's assignor.

Plaintiff further says that before the levy and assessment of said taxes the said defendant was and has been continuously ever since then a non-resident of the State of Iowa.

The plaintiff further says that it was also agreed and understood that said county would sue defendant in its own name for the taxes mentioned in said petition, and in case it should collect the same, would pay them to plaintiff's assignor. Plaintiff further says that if said defendant refuses to pay said taxes to said county and claims that said taxes have been paid to said county through or by reason of the plaintiff having given or delivered the same to the county, the said defendant is bound to repay the same to plaintiff. Wherefore the plaintiff asks the relief in the premises heretofore prayed for, that a decree be entered in the name of said county against defendant for said amount, viz: $15,000 and interest, and be make a lien on the lands described in the petition and for such other and further relief as equity and good conscience may require.

GEORGE CRANE AND
JOHN DOUD, JR.,
Attorneys for Plaintiff.

And afterwards, on the 5th day of April, 1879, there was filed in the office of the clerk of the circuit court the answer of the defendants, in words and figures following:

8 Paragraph 1. And now comes the defendants, Woolsey Welles, A. K. Welles and Wm. B. Welles, substituted in place of Wm. B. Welles, deceased; and for answer to the pleading or petition filed by said county of Webster in this suit says: That said county is not a party plaintiff on the record and is not entitled to ask for any relief in the character of the plaintiff in this suit, and has no legal right to take advantage of or claim any benefit from the commencement of this suit by the said Edward K. Goodnow.

Par. 2. Said defendants further answering, den*ies* each and every allegation in said pleading or petition contained.

Par. 3. Said defendants further answering, says that all taxes mentioned in said petition were duly paid and satisfied to said county by the said Iowa Homestead Company as soon as the same became due, and said defendant is no longer liable therefor.

Par. 4. Said defendants further answering, says: That if said county ever had any right or cause of action against defendants for the recovery of said taxes, or any part thereof, said cause or action arose or accrued to said plaintiff more than five years before the commencement of this suit, and it is therefore barred by the lapse of time.

Par. 1. Said defendants further answering, says: That said Iowa Homestead Company paid said taxes to said county voluntarily and without request, knowledge or consent of the defendants, and with full knowledge of the facts and circumstances upon which defendants' claim of title to said lands was founded.

Whereupon defendants ask to be dismissed with their proper costs.

THEO. HAWLEY,
Defendants' Attorney.

Also on the same day the following answer was filed:

Par. 1. And now comes the defendants, Woolsey Welles, A. K. Welles and Wm. B. Welles, trustees substituted for Wm. B. Welles, deceased, and for answer to the original petition of plaintiff, Edward K. Goodnow, and the amendment thereto, den*ies* each and every allegation therein contained.

Par. 2. Said defendants further answering says: That if said plaintiff ever had any right or cause of action against de-
9 fendants for the recovery of said taxes or any sum of money on account or by reason of the plaintiff having delivered or paid said taxes to said county, such cause of action arose or accrued to plaintiff more than five years before the commencement of this suit, and it is therefore barred by the lapse of time.

Par. 3. Said defendants further answering, says: That the said homestead company paid said taxes to said county voluntarily and without the request, knowledge or consent of the defendant, and with full knowledge of all the facts and circumstances upon which defendants' claim was founded. Whereupon defendants asked to be dismissed with reasonable costs and charges.

THEO. HAWLEY,
Defendants' Attorney.

And on the same day the plaintiff filed his reply as follows:

And now comes said plaintiff and for reply to the answer of said defendants, herein deny the same and each and every allegation thereof.

GEORGE CRANE AND
JOHN DOUD, JR.,
Attorneys for Plaintiff.

And on the same day the following reply was filed:

And comes said Webster County, defendant, and for reply to said answer of defendants, Welles, denies the same and each and every allegation thereof, except the payment of said taxes by plaintiff's assignor.

J. F. DUNCOMBE,
Attorney for Webster County.

And afterwards, to wit: on the 3d day of June, 1881, there was filed in said cause the amended answer of defendants, Welles, in words and figures following:

In the Circuit Court, Webster County, Iowa.

EDWARD K. GOODNOW
vs.
WOOLSEY WELLES, A. K. WELLES, and WM. B. WELLES, Trustees.

Comes now the defendant and by leave of court first had and obtained, amends his answer herein and alleges,—

10 That in an action in which the said Iowa Homestead Company, the assignor of plaintiff was plaintiff, and The Des Moines Navigation and Railroad Company, and Wm. B. Welles and others were defendants, commenced in the district court of Webster county, Iowa, and finally determined in and by the Supreme Court of the United States, the said homestead company, prior to the date of the alleged assignment of said alleged cause of action in the petition herein, asserted and maintained among other things the right to recover of the defendants therein the same taxes, the recovery of which is sought for in this action; that one of the issues made by the pleadings in said cause, and determined by the proofs in said action, was the right of the said homestead company to recover the same identical taxes sought to be recovered in this action, and that it was in said action determined, adjudged and found by said Supreme Court of the United States at the December term thereof for 1872, that the said homestead company was not entitled to recover said taxes or any part thereof, which said determination and judgment has never been in any manner set aside, vacated or modified, but that the same remains and is still in full force and effect.

Further answering, defendant avers that the several causes of actions set up in plaintiff's petition, accrued more than six years before the commencement of this suit, and at all times since the date of the payment of said taxes the defendants, A. K. and Wm. B. Welles, were citizens of the State of New York, and that by the laws of the State of New York, all causes of action based upon an expressed or implied promise, not in writing, are barred after the expiration of six years from the date when said causes of action severally accrued. That the said several causes of action set up in plaintiff's petition are barred by the lapse of six years from the date when the same accrued, under the laws of the State of New

York, and that more than six years have elapsed from the time said causes of action severally accrued and the date of the commencement of this suit.

THEO. HAWLEY,
Defendants' Attorney.

11-13 And afterwards, on the 20th day of December, 1881, there was filed in — the reply of the plaintiff as follows:

And now comes the plaintiff, Edward K. Goodnow, and for reply to the answer filed by the defendants in the above-entitled suit, says that the decree or judgment therein set up as an adjudication of the plaintiff's rights, is and was null and void for the reason that the courts of the United States had no jurisdiction of said suit, and no legal power or authority to render a decree or judgment therein. Said plaintiff denies each and every allegation in said answer contained and asks judgment as heretofore prayed.

GEORGE CRANE,
Attorney for Plaintiff.

14 * * * * * * *

And afterwards, on the 5th day of March, 1884, there was filed in said cause the motion and affidavits of the defendant for leave to withdraw 3d paragraph of answer in words and figures following:

In the District Court, Webster County, Iowa.

EDWARD K. GOODNOW
vs.
WOOLSEY WELLES *et al.*, Trustees of Wm. B. Welles, Deceased.

Now comes the defendants above named and moves the court for leave to withdraw paragraph 3d of their answer to the pleading or petition herein by the defendant, Webster County, filed by them April 5, 1879, and supports this application by the following affidavits and the files in this case.

THEO. HAWLEY,
Defendants' Attorney.

STATE OF IOWA, }
County of Webster, } *ss:*

I, Theo. Hawley, being duly sworn, do depose and say that as the attorney of said defendants I filed the answer of said defendants to the pleadings or petition of the defendant, Webster County, on the 5th day of April, 1879. That in said answer as the third defense or paragraph, it was alleged as follows, to wit: Said defendant further answering says that all of said taxes so mentioned in said petition were duly paid and satisfied to said county by the said Iowa Homestead Company as soon as the same became due, and said defendant is no longer liable therefor. That said answer was drawn and filed containing said allegation without any consultation with my

client, the defendant herein. That they had no knowledge
15 of the filing of said answer, or of the contents of the same. That they did not direct me to plead said defense or knew that the same was pleaded. That A. K. Welles and Wm. B. Welles, two of said defendants, were at the time said answer was drawn, not in the State of Iowa. That Woolsey Welles, the other of said defendants, resided at that time in Fort Dodge, in said county, but that I had no opportunity for consultation with him as to the defense said defendants had to said pleading or petition, for the reason of his absence from his home at that time. That said action was originally commenced against Wm. B. Welles, but that he had deceased, and at the April, 1877, term of the circuit court of said county, and the same day said answer was filed his death was suggested by the attorney for plaintiff, and on his motion these defendants were substituted and said answer filed for them. That this case, with a number of others, involving the same or similar issues were continued for one or more terms in the circuit court of said county, until they were, on motion of plaintiff, transferred to this court, and that since such transfer they have been continued by agreement from term to term until the present term. That the order heretofore made in this case by the circuit court as to taking proof herein has been ignored and waived by both parties in this and in all the other similar cases, and the proofs in all of said causes which have been heretofore tried, either in this court or in the said circuit court have been under stipulations offered in the trial thereof, and not under the order made by said circuit court. That since said order was made by said circuit court the plaintiff has filed his amendments to his petition and the defendants *has* answered thereto and filed an amendment to their answer herein.

THEO. HAWLEY.

Subscribed and sworn to before me this 4th day of March, 1884.
[L. S.] W. H. BLISS, *Clerk.*

16–21 In the District Court, Webster County, Iowa.

EDWARD K. GOODNOW
vs.
WOOLSEY WELLES, A. K. WELLES, and WM. B. WELLES.

STATE OF IOWA, *Webster County,* } *ss:*

I, Woolsey Welles, being duly sworn, do depose and say that I am one of the defendants above named. That I had no knowledge until the commencement of this term of court that the answer herein filed for these defendants on the 5th day of April, 1879, to the pleading or petition of the defendant, Webster County, contained the defenses or allegations contained in the third paragraph thereof. That I never directed the same to be pleaded and was not consulted in reference thereto before said answer was filed. That at the time said answer was filed, my codefendants, A. K. Welles and Wm. B.

Welles, were non-residents of the State of Iowa, and I am confident that neither of them had any knowledge of said answer or of the allegations therein contained, and that I have had the management of this case for the defendants so far as said defendants have given any directions therein.

WOOLSEY WELLES.

Subscribed and sworn to before me this 5th day of March, 1884.
[L. S.] THEO. HAWLEY,
Notary Public.

* * * * * * *

22 And afterwards on the same day the plaintiff offered in evidence the following agreed statement of facts.

E. K. GOODNOW
vs.
WOOLSEY WELLES, A. K. WELLES, and WM. B. WELLES, Trustees Substituted in Place of Wm. B. Welles, Deceased.

For the benefit of all parties to this suit it is hereby stipulated and agreed as follows:

It is admitted that the facts set forth in the first, second and eighth paragraphs—original petition are true. It is further admitted that prior to the year 1864 and till the year 1873, the defendant, Wm. B. Welles, was the owner in fee simple of all the land mentioned in the plaintiff's petition, and continued to be such owner until —— —, ——, when he conveyed the same in trust to said Woolsey Welles, A. K. Welles and Wm. B. Welles for certain donees to whom he gave said lands as mentioned in the conveyance thereof, and that said trustees as such are the owners and holders of all the estate and interest, which was owned by said Wm. B. Welles. That said Wm. B. Welles died in the State of New York, on the — day of ——, 1878. That during his lifetime he was a citizen and resident of the State of New York, and never was a resident of the State of Iowa.

It is further admitted that the said county of Webster duly and legally levied and assessed upon the lands aforesaid for the
23 years named, the several amounts of taxes set forth in Exhibit "A," hereto annexed and made a part of this agreement.

It is further admitted that said several assessments of said lands were made by said county to unknown owner.

It is further admitted that the said Iowa Homestead Company gave or delivered over to the said county the several amounts of taxes mentioned in Exhibit "A," at the several dates therein set forth and took from said county receipts for the sum of money so handed over. That at the time said money was given to said county, said homestead company did not know or believe that said defendant was the owner of said lands. That said several taxes was handed over without any actual demand therefor by said county. That said defendant has never paid said taxes to said county or any

part thereof, unless the payment made by said homestead company constituted a payment for the benefit of the defendant.

It is admitted that said county has always hitherto refused to refund to homestead company or to said Goodnow the taxes delivered over to said county as aforesaid.

It is further admitted that in the year 1863, said defendant, Wm. B. Welles, was, and has been continuously ever since then, a non-resident of the State of Iowa.

It is further admitted that all of said taxes were handed over by said homestead company to said county without any previous request from the said defendant and by mistake as to the true ownership of said lands, but in good faith and under the belief of ownership as alleged in the first, second and third paragraphs in the petition, and that defendant knew that said taxes were being paid by said company at the time.

These facts are admitted for the purpose of the trial of this suit and nothing else.

Signed this 5th day of April, 1879.

JOHN DOUD, JR., AND
GEORGE CRANE,
Attorneys for Plaintiff.
THEO. HAWLEY,
Defendants' Attorney.

24 Referred to and made a part of the agreed statement of facts.

For 1864, paid January 16th, 1865	$621 57
For 1865, paid November 25th, 1865	953 40
For 1866, paid February 28th, 1867	1,095 92
For 1867, paid July 1st, 1868	91 82
For 1868, paid April 26th, 1869	88 12
For 1869, paid February 28th, 1870	157 62
For 1870, paid February 28th, 1871	270 09
For 1871, paid February 29, 1872	374 75

Plaintiff rests.

* * * * * * *

25 Defendants offer in evidence certified copy of a deed from Wm. B. Welles to Edwin C. Litchfield, dated the 6th day of February, 1866, filed January 30th, 1866, and recorded in Book "F," of Deeds of Webster county, page 900, being the same
26 & 27 deed found on pages 19 and 20 of this abstract and marked Exhibit B.

Defendants offer in evidence deed from Wm. B. Welles to these defendants, Woolsey Welles, A. K. Welles and Wm. B. Welles, dated the 10th day of September, 1873, and recorded among the records of Webster county, in Book "O" of Deeds, on pages 150, 151, 152, 153 and 154. This deed conveys to the grantees all the land described in plaintiff's petition except all of sections 11, 13 and 17, and the south half of section 23, all in township 88, range 29, which had been conveyed to E. C. Litchfield, and all of section 33, township 89,

range 28, subsequently conveyed to Woolsey Welles. This is the deed referred to in agreed statement of facts, page 22 hereof.

Defendants offer in evidence deed from Wm. B. Welles and Woolsey Welles, dated the 1st day of September, 1874, and recorded among the records of Webster county.

This deed conveys to the grantee all of section 33, township 88, range 28, being part of the lands described in plaintiff's petition.

Plaintiff objects to the deeds being used in evidence because they are already on file in court in another case, and defendants has no right to bring them into this case.

Defendants ask leave to substitute sworn copies for the deeds.

Mr. CRANE: I have no objection to that.

28–44 * * * * * * *

Defendants offered in evidence the decree entered in the Supreme Court of the United States in the case of The Iowa Homestead Company *vs.* The Des Moines Navigation Company and Wm. B. Welles and others, being the case described in defendants' answer herein. The decree is as follows:

EXHIBIT "B."

Supreme Court of the United States, December Term, 1873.

THE IOWA HOMESTEAD COMPANY, Appellant,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, The Des Moines Valley Railroad Company, Samuel G. Wolcott, Wm. B. Welles, Raswell Burrows, Elvin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, *et al.* } No. 128.

Appeal from the circuit court of the United States for the district of Iowa.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Iowa, and was *agreed* by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause, be, and the same is hereby affirmed with costs.

28th April, 1873.

* * * * * * *

45 The plaintiff then read in evidence from the printed transcript of the record in the Supreme Court of the United States in the case of the Iowa Homestead Company against the Des Moines Valley Railroad Company, referred to in said agreed statement of facts, the following portions thereof:

In the District Court of Webster County, Iowa.

IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, EDWIN C. LITCHFIELD, ELECTUS B. LITCHFIELD, SAMUEL G. WOLCOTT, and Others, and Roswell B. Burrows.

To said defendants above named:

You are hereby notified that there is now on file in the office of the clerk of the district court of Webster county, Iowa, the petition of plaintiff aforesaid, claiming of you that the said Iowa Homestead Company is in possession and has the legal title to certain lands in the alternate sections, within five miles of Des Moines river above the Raccoon fork. That you claim in some way an adverse title thereto, that you be enjoined from prosecuting actions at law or pre-emptions to said lands to quiet the plaintiff's title and for other relief. You are also notified that unless you appear thereto and defend before noon of the second day of the term of said district court of Webster county, to be held on the twelfth day of October, 1868, a default will be entered against you and judgment rendered thereon.

IOWA HOMESTEAD COMPANY.
GRANT & SMITH, *Attorneys.*

DES MOINES, IOWA, 10*th October*, 1868.

Accepted service for the defendants, The Des Moines Navigation and Railroad Company and Edwin C. Litchfield and Electus B. Litchfield.

J. BROWN,
Agent, for Defendant-.

At Chambers, City of Davenport, Scott County, Iowa.

Ordered that a temporary writ of injunction do issue, as
46 prayed, on plaintiff's filing bond in penal sum of $500 conditioned as required by law, and the sureties to be approved by the clerk of Wester county, Iowa, district court.

Dated first day of October term, A. D. 1868.

JOHN F. DILLION,
Chief Justice Supreme Court, Iowa.

THE STATE OF IOWA
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. WOLCOTT, WM. B. WELLES, ROSWELL B. BURROWS, EDWIN C. LITCHFIELD, WM. MCALPINE, RICHARD B. CHAPMAN, ALBERT TRACY, HARRIET TRACY, ELECTUS B. LITCHFIELD, EDWIN WADE, JOHN STRYKER, The Des Moines Valley Railroad Company, *et al.*

Whereas, the Iowa Homestead Company has filed in our district court for the county of Webster, a petition claiming that the said homestead company, a corporation created by the laws of Iowa, has

the legal title to the lands (which are mentioned and described in plaintiff's petition) and that you or some one of you have brought and intend to bring certain actions at law against persons in possession of said land, to divert the title of said Iowa Homestead Company, and that you or some of you are about to prove and claim pre-emptions on some of the lands which are named (in said petition) and has prayed in said bill to grant them title to said lands.

Now these are to command you and each of you, your agents, attorneys, servants, that you do wholly refrain from prosecuting said actions at law, or either of them, and that you wholly refrain from further applying for or proving up pre-emptions on any of said lands, until the further order of our said district court for the county of Webster. And you will disobey this writ at your peril.

Witness and in testimony, I, W. Lumpkin, clerk of the district court, have hereunto subscribed my name and affixed the seal of said court, at office in Fort Dodge, this sixth day of October, A. D. 1868.

W. LUMPKIN,
Clerk District Court.

47 Accepted service of the within writ for the defendants, The Des Moines Navigation and Homestead Company, Edwin C. Litchfield and Electus B. Litchfield.

J. BROWN,
Agent of said Defendants.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD CO. *et al.*

In this cause come the defendants, Litchfield and John Stryker, and file their affidavit, bond and petition for the transfer of this cause in the circuit — of the United States for the district of Iowa under certain acts of Congress of the United States, and the court being satisfied that the said affidavit and petition are sufficient under the law, and said bond being approved by the court, it is ordered that this cause be transferred to said circuit court of the United States, for the district of Iowa, as to said defendants *in re*, and the clerk of this court is ordered to make the proper papers for said transfer.

THE IOWA HOMESTEAD COMPANY
vs.
EDWIN C. LITCHFIELD, ELECTUS B. LITCHFIELD, and JOHN Stryker, Impleaded with Roswell B. Burrows, The Des Moines Navigation and Railroad Company, and Others.

STATE OF IOWA, *Webster County*, } *ss:*

I, John Brown, of Des Moines, in the county of Polk, in said State, being sworn, do depose and say that I am the agent of the defend-

ants, Litchfields and Stryker, in the above-entitled action, that the same is now pending in the district court of Webster county, of Iowa; that the said defendants for whom I am agent as aforesaid, are citizens of the State of New York, and that the plaintiff is a citizen of the State of Iowa. That the matter in controversy and dispute between this plaintiff and each and every of the defendants, exceeds the sum of five hundred dollars, exclusive of costs. That I have reason to believe and do believe that from prejudice and local influence, said defendants will not be able to obtain justice
48 in the State courts of Iowa, in which this action is pending and untried.

JOHN BROWN.

Subscribed and sworn to by John Brown, before me, this 13th day of May, A. D. 1866.

GEORGE B. CORRHILL, *Clerk.*

Know all men by these presents:

That we, Edwin C. Litchfield and Electus B. Litchfield and John Stryker, as principals, and John Brown, as surety, are hereby held and firmly bound unto the Iowa Homestead Company in the penal sum of one hundred dollars, lawful money of the United States, to the payment of which well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

The condition of this is such that if the said Edwin C. Litchfield, Electus B. Litchfield and John Stryker, shall enter or cause to be entered in the circuit court of the United States, to be held in and for the district of Iowa, copies of all process pleadings, depositions, testimony and other proceedings in a certain suit or action now pending in the district court of the county of Webster and State of Iowa, in which The Iowa Homestead Company is plaintiff, and said Edwin C. Litchfield, Electus B. Litchfield and John Stryker, impleaded, etc., are defendants, and shall do such other appropriate acts, as by the act of Congress approved July 27, 1866, entitled An act for the removal of causes in certain cases from State courts are required to be done upon the removal of a suit in the United States courts, then this obligation to be void, otherwise in full force.

EDWIN C. LITCHFIELD.
ELECTUS B. LITCHFIELD.
JOHN STRYKER.
JOHN BROWN.

Petition for Removal.

To the district court of Webster county, Iowa:

The petition of Edwin C. Litchfield, Electus B. Litchfield and John Stryker, defendants in the above-entitled action, respectfully shows that they are citizens of the State of New York. That this
49 action is now pending in the district court of Webster county, Iowa. That the matter in dispute herein exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioners further show that they have in this court their affidavit as required by the act of Congress, approved March 2, 1867, entitled "An act to amend an act entitled An act for the removal of causes in certain cases from the State court approved July 27, 1866."

And your petitioners file this petition praying for the removal of this suit into the next circuit court of the United States to be held in and for the district of Iowa, and they herewith offer the surety required by the said above-entitled act.

D. O. FINCH AND
J. M. ELLWOOD,
Attorneys for Def'ts Litchfield and Stryker.

This affidavit, bond and petition are filed in place of the original filed in district court of Webster county, 13th October, 1868, the same appearing to be lost and not returned.

GRANT, *For Plaintiff.*
J. M. ELLWOOD,
For Litchfield and Stryker.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & R. R. Co. *et al.* } Oct. 16, 1868.

And now on this day comes the defendants, Crouse, McDermott and Cotter, by their attorney, G. Parsons, and files a motion to dissolve the injunction, which, coming on to be heard, and the court being fully advised in the premises, said motion is sustained as to them. Whereupon this cause is ordered transferred to the circuit court of the United States as to other defendants.

Webster District Court, Oct. 13, 1868.

In this cause the defendants Litchfield and Stryker, come and file their affidavits, bond and petition for the transfer of this cause to the circuit court of the United States for the district of Iowa under certain acts of Congress of the United States, and the court being satisfied that said affidavits and petition are sufficient under said law, and said bond being approved by the court it is ordered that this cause as to the said defendants be transferred to said
50 circuit court of the United States for the district of Iowa, and the clerk is ordered to make the proper papers for said transfer.

Mr. CLERK: Please make the above entry in this cause, and the further entry that as to other defendants the cause is continued by agreement.

GRANT,
For Plaintiff.

The foregoing original notice, acceptance of service, order of Dillon, justice, writ of injunction, and acceptance of service thereof, were

read in evidence by plaintiff. Also the affidavit of James Grant as to the truth of the matters contained in the petition or bill of complaint in said homestead suit which was in the words following:

STATE OF IOWA, }
Scott County. }

I, James Grant, being duly sworn, depose on oath that I am one of the attorneys for the plaintiff; that the facts stated in the foregoing petition are all of them of record except the allegations of the interest and intent of the parties in the suit of Wolcott *vs.* The Des Moines Navigation Company. I have examined the records referred to in the bill and have been informed as to the facts about the Wolcott suit by parties who appeared to know them and I believe the allegation of the bill to be true.

JAMES GRANT.

Sworn to and subscribed before me, this 1st day of October, 1868.

JOHN F. DILLION,
Judge Supreme Court, Iowa.

STATE OF IOWA, }
Webster County. }

District Court.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND R. R. Co. *et al.*

The petition of the Iowa Homestead Company shows:

1. That said company is a corporation duly created by the laws, and a citizen of the State of Iowa, for the purpose of buying and selling lands in said State; that said plaintiffs, by deed of purchase, bearing date the 12th day of November, 1863, acquired by and through the Dubuque & Sioux City Railroad Company, all the right of said company, the Dubuque & Pacific Railroad Company, and the State of Iowa, to about fifty thousand acres of land lying on
51 the east side of the Des Moines river, in Webster and Humboldt counties, Iowa, being the odd sections of land within the limits of the Dubuque & Pacific railroad grant of 1856, and the Des Moines river grant of 1846; a copy of the said list of lands is hereunto annexed and made part of this bill. And by said deeds and certificates, the plaintiff acquired a title to about twenty thousand acres of land, in the odd sections within said grants in Webster and Hamilton counties, west of said Des Moines river, a list of which is hereto annexed and made a part of this bill. Of these lands the fifty thousand acres lying east of the Des Moines river, are claimed by the Des Moines Navigation and Railroad Company, a corporation created by the laws of Iowa, and its assignees; and some title or claim to twenty thousand acres of land on the west side of the river is or has been made by the Des Moines Valley Railroad Company, a corporation created by and a citizen of the State of Iowa.

2. That on the 8th of August, 1846, by an act of Congress, a grant

of land was made to the Territory of Iowa, of alternate sections of land within five miles of the Des Moines river in said State to improve the navigation from its mouth to the Raccoon fork; said land to be selected within said Territory by an agent to be appointed by the governor, subject to approval by the Secretary of the Treasury of the United States; said lands to become the property of the State when admitted into the Union, which event occurred about a year after. On the 17th of October, 1846, the governor of the Territory of Iowa was notified by letter from the Commissioner of the Land Office, "That under the grant, the Territory of Iowa was entitled to the vacant lands, in alternate sections, within five miles on each side of the Des Moines river, from the northern boundary of Missouri to the Raccoon fork." The territorial and State authorities acquiesced in the opinion expressed in this letter, and an agent was appointed to make selections, and he did make the selections below the fork of the Raccoon. No question arose as to the further extent of this grant until nearly two years thereafter. On the 24th of February, 1847, the State of Iowa appointed a board of public
52 works to improve the navigation of said river. In a letter to the secretary of this board, dated February 23, 1848, R. M. Young, Commissioner of the General Land Office, after answering a letter to him, on other subjects, says: "A question has arisen as to the extent of the land grant to Iowa, under act of August 8th, 1846, and the opinion of the office requested."

"The grant is one of equal moiety in alternate sections, and on each side of said river, to be selected within said Territory, &c., the proceeds to be applied to improve the navigation of the river from its mouth to the Raccoon fork. Hence the State is entitled to the alternate sections within five miles of the Des Moines river, throughout its whole extent, within the limits of Iowa."

On the 19th of June, 1848, a proclamation was issued by the President, and countersigned by said Young, ordering into market some of the lands in the odd sections, above the Raccoon fork, which under the expression of the letter of February 23, belonged to the State.

The board of public works in Iowa protested against this, but no notice was taken of it by said Young. On the 8th of January, 1849, the delegation from Iowa in Congress called the attention of the Secretary of the Treasury to the constructions of the act of August 8, 1846, and claimed the alternate sections of land on the said river above the forks of the Raccoon. The Secretary of the Treasury, R. J. Walker, in reply to this letter, on the 2d of March, 1849, conceded that the grant extended to the source of the river, which would include a large part of what is now the State of Minnesota, and would make the grant nine hundred thousand acres of land.

On the 2d of March, 1849, Walker, Secretary of the Treasury, by letter advised Young, Commissioner, of this opinion, and on June 16, 1849, Young directed the proper land officers to withhold the lands from sale in odd-numbered sections. On the 19th of December, 1849, Butterfield, Commissioner, informed Jesse L. Williams,

secretary of the board of public works, that no selections had been made above the forks.

On the 14th of January, 1850, the Commissioner of the Land Office informed Ewing, Secretary of the Interior, a new officer
53 created by law, and taking charge of the public lands, that a list of land charged against Iowa amounted to 825,078 acres, and that when adjusted the amount between the Raccoon fork and source of the river was estimated to contain 900,000 acres.

On the 13th of March, 1850, the said Commissioner submitted to Ewing, Secretary, three lists of lands, the first of which showed the tracts falling within the limits of the grant above the Raccoon fork, under the decision of the Secretary of the Treasury of March 2, 1849. On the 6th of April, 1850, Ewing, Secretary of the Interior, reversed the opinion of Walker, held that the grant did not extend above the forks, refused to confirm the selection of March 13, and required the Commissioner to report to Congress, that that body, if it saw fit, might extend the grant.

On the 14th of April, 1850, the Senators and Representatives from Iowa appealed from that decision to the President. The President, Taylor, referred the question to Reverdy Johnson, Attorney General, who, on the 19th of July, 1850, gave his opinion, that the grant extended above the forks to the source of the river. Before this opinion was delivered, the President died, a new Cabinet was appointed, and, instead of giving effect to Johnson's opinion, the question was submitted to Crittenden, the new Attorney General, who, on the 30th of June, 1851, gave his opinion that the grant did not extend above the Raccoon fork. A. H. H. Stuart, Secretary of the Interior, on the 29th of October, 1851, addressed a letter to the Commissioner of the General Land Office, directing him to select and report for his approval, a list of the alternate sections of land claimed by the State of Iowa, above the Raccoon fork, assigning as a reason therefor, that, by approving the selections without prejudice, the question would be left open to the construction of judiciary, and that the questions involved were more of a judicial than an executive character, and that the question must ultimately be settled by the judiciary.

On the following May, three lists of lands were prepared in the General Land Office, headed as follows:

"No. 1. Showing the tracts falling within the limits of
54 the Des Moines grant, above the Raccoon fork, so far as the surveys have extended, under the decision of the Secretary of the Treasury, March 2, 1849, that such grant extended to the northern boundary of the State.

"No. 2. Showing tracts disposed of within these limits, between the date of one of the orders limiting the grant, and one extending it.

"No. 3. Showing the vacant lands subject to the claim of the State."

The Secretary of the Interior on the 30th of October, 1851, approved of this last list in accordance with his view of October 29th.

On the 30th of October, 1851.....214,391.58 acres.
" 10th of March, 1852.....143,908.37 "
" 17th of December, 1853..... 33,142.43 "
" 30th of December, 1853..... 12,812.51 "

were thus certified and approved by the Secretary of the Interior. These approvals were certified under the reservations above referred to in the letter of October 29th, 1851.

The 12,812.51 acres above referred to, were selected under the act of September 4, 1841, giving to each of the new States 500,000 acres of land on coming into the Union.

On the 21st of March, 1856, the Commissioner of the General Land Office decided that the grant did not extend above the Raccoon fork. The question was brought anew before the Secretary of the Interior, and he referred it to the Attorney General who advised a proposal of settlement. This was not accepted by the State of Iowa. On the 7th of May, 1858, the Secretary of the Interior rejected the claim of the State. An appeal was taken to the President, who referred the question to Attorney General Black, who decided, in the letter dated November 22, 1858, that the claim of the State did not extend north of the Raccoon fork.

On December, 1869, the Supreme Court of the United States in suit between E. C. Litchfield *vs.* The Dubuque & Pacific Railroad Company—Litchfield claiming under the act of 1846, held
55 that the grant did not extend north of the fork of the Raccoon, and that the acts of Stuart and McClelland, Secretaries of the Interior, in reserving and setting apart the lands north of the Raccoon fork, were null and void, and by that decision carried out the suggestion of the Secretary of the Interior, that the question was a judicial one, and must be settled by the courts.

3. On the 15th of May, 1856, Congress passed an act making a grant of land to the State of Iowa in alternate sections, to aid in the construction of certain railroads in said State. By section one, among other roads, a grant of land was made of alternate sections, designated by odd numbers, of six sections of land in width on each side of a railroad, from Dubuque to a point on the Missouri, at or near Sioux City; and if, when the line of said road was definitely fixed, the United States had sold any of said sections, then the State was authorized, subject to the approval of the Secretary of the Interior, from other alternate sections within fifteen miles of the line of the road to make up the quantity. Said section provided that the lands so granted should be applied exclusively to the construction of the road, and excluded from the grant all lands before reserved by act of Congress, or any other manner, by competent authority for the purpose of aiding in works of internal improvement or any other purpose whatever. Congress had, prior to this, in 1850, made a grant to the State of certain swamp lands, which might and did, upon survey and location, include a part of the lands otherwise included in the railroad grant of 1856.

On the 14th of July, 1856, the State of Iowa, by legislative act, accepted the grants made by act of Congress of May 15, 1856, and parcelled out the lands to the various railroad companies therein

referred to, and by the fifth section of said act, so much of the lands, interests, rights, powers and privileges as are or may be granted and conferred under said act of Congress to aid in the construction of the railroad from Dubuque to Sioux City, was granted and conferred by the State to the Dubuque & Pacific Railroad Company, a body corporate, created by and existing under the laws of Iowa.

56 The act of Congress of May 15, 1856, authorized the State to dispose of the lands in this way, and a quantity of land not exceeding one hundred and twenty sections for every twenty miles of road built, was to be conveyed to the company, and whenever the governor of the State should certify to the Secretary of the Interior that any continuous twenty miles of road was completed, then a hundred and twenty sections of land next nearest that was to be sold and conveyed to the said railroad corporation, and so on from time to time, until the road is completed, and if any of the road was not completed in ten years, no further conveyance was to be made, and the lands unsold were to revert to the United States. The Iowa act of July 14, 1856, required the Dubuque & Pacific Railroad Company to comply with these terms. The said Dubuque & Pacific Railroad Company accepted the terms of said act. The most of the road was surveyed by the 18th of April, 1857. A plat of the same was by that day presented by the governor of Iowa to the Secretary of the Interior, and the alternate sections on the line thereof designated and set apart by him to the State of Iowa under the terms of the grant of the 15th of May, 1856. The line of this road crossed the Des Moines in an east and west direction above the Raccoon fork, and though a claim had been made, and even lands certified under the act of August 8, 1846, yet, after the decision referred to by the Secretary of the Interior, the State of Iowa asked and the Secretary of the Interior reserved the lands, within five miles of the Des Moines river, above the Raccoon fork, for the railroad instead of the river grant, and said lands were reserved by proclamation of the President immediately after passage of the act, 1856.

The said Dubuque & Pacific Railroad Company immediately after the location of said railroad, and the selection and setting apart of the lands granted under said act, proceeded to build their road. The said railroad company performed all the conditions of said act up to the first day of June, 1861. In the month of August, 1861, the Dubuque & Pacific Railroad Company was merged into a new company, called the Dubuque & Sioux City Railroad Company, a

57 corporation duly created under the laws of the State of Iowa, and which succeeded to all the rights and obligations of the Dubuque & Pacific Railroad Company. On the first of January, 1861, the Dubuque & Pacific, or the Dubuque & Sioux City Railroad Company, had built and equipped five sections of twenty miles each, making one hundred miles of continuous railroad, and by the terms of the grant from Congress and the Iowa legislature, had acquired a complete and perfect title to the lands afterwards conveyed by the Dubuque & Sioux City Railroad Company to the plaintiff's assignors. The governor of Iowa in March, 1860, certified that the four sections

of twenty miles each of said railroad from Dubuque to Sioux City, were completed according to the act of Congress of the 15th of May, 1856. On the 25th of April, 1861, the governor of Iowa certified that the Dubuque & Sioux City Railroad Company had completed the fifth continuous twenty miles from Dubuque west, making one hundred miles, and, on the 29th of July, 1865, the governor of Iowa certified that said company, on the 2d of June, 1864, had completed the sixth section of twenty miles of said road west from Dubuque.

By the completion of said first five sections of twenty miles the said Dubuque & Sioux City Railroad Company, on the 21st of April, 1861, became entitled to the lands, on both sides of the Des Moines river, conveyed to and now held by the plaintiffs.

During the progress of the controversy between the State and Federal officers in relation to the construction of the act of 1846, selections of land which might belong to the State were made and approved as above stated, but not otherwise. After the opinion of Attorney General Black, in 1858, the State of Iowa and the Secretary of the Interior treated the lands in Iowa as belonging to the railway (not river) grant, and on application of the Des Moines Navigation Company for a title, as assignee of the State, was refused by the Secretary of the Interior in 1860 and 1863.

On the 11th of April, 1863, the Commissioner of the General Land Office certified, and the Secretary of the Interior approved the selections, that the Dubuque & Sioux City Railroad Company
58 was entitled to the lands now claimed by the plaintiffs, as purchasers of the Dubuque & Sioux City Railroad Company, and said railroad company acquired title to *to* the same when the certificate was given to the governor, in 1861, that they had completed the fifth section of twenty miles of their road.

The State of Iowa, under the river grant of the 8th of August, 1846, undertook to improve the navigation of the river, and up to the 9th of June, 1855, had sold about 327,000 acres of land, of which amount 58,830 acres were located above the Raccoon fork. On the 9th of June, 1854, the State made a contract with the Des Moines Navigation and Railroad Company, a corporation created by the laws of Iowa, to improve the navigation of the river, and to convey to said corporation all the remaining lands belonging to the State under the act of 1846. This corporation made some progress in their work, and as the improvements progressed, the State, by its proper officers, issued to the company certificates of land, the first dated the 14th day of May, 1855, for 88,853.10 acres; the second, May 6, 1856, for 116,636.54 acres; making in all 305,489.64, all located above the Raccoon forks, except about 50,000 acres, and including the lands owned or claimed by the plaintiffs, east of the Des Moines river.

The Commissioner of the General Land Office and the Secretary of the Interior refused to certify or convey these lands to the State or the Des Moines Navigation and Railroad Company, their last act being to set apart the lands on the 30th of December, 1853, and there being no other provision made for payment to the said company, in pursuance of joint resolutions of the legislature of March

22, 1858, settled the difficulties arising out of the construction of the grant of August 8, 1846, whereby the State relinquished its title to the land certified by the State officers to the company, to wit: 205,489.64 acres. The company paid the State twenty thousand dollars and abandoned the work.

The State, on the same day, March 22, 1858, by legislative act, conveyed its remaining interest in the lands to the Keokuk, Fort Des Moines & Minnesota Railroad Company, now called the Des Moines Valley Railroad Company, a corporation created by
59 the laws of Iowa, subject to the grants made by the State to the railroad companies under the acts of May 15, and July 14, 1856.

On the 2d of March, 1861, Congress by a joint resolution held that the grant of August 8, 1846, did not extend above the Raccoon fork, and released to the State of Iowa certain lands above the fork which had been improperly certified to the State by the Secretary of the Interior, and were then held by *bona fide* purchasers from the State. This joint resolution was construed by the State and Congress, through its executive officers, to refer to certain lands above the fork, conveyed to settlers or other individuals, amounting to about 58,000 acres, a list of which is herein referred to, and includes no part of the lands claimed by the plaintiffs. At the date of this resolution, the Dubuque & Sioux City Railroad Company had acquired from the State, with the assent of the Secretary of the Interior, the title to the lands now claimed by the plaintiff in this controversy. The certificates therefor had then all been issued by the governor of the State.

On the 12th of July, 1862, Congress passed an act whereby the grant of lands to the Territory of Iowa by act of Congress of August 8, 1846, was extended so as to include the alternate sections of land lying within five miles of the Des Moines river, above the Raccoon fork, to the northern boundary of the State. Said act and resolution of the second of March, 1861, was passed at the request of the legislature of Iowa, with an express reservation of all rights to the grantors of the plaintiff. The resolutions of the the legislature hereto annexed. Said act provided that if any of the lands had been sold or otherwise disposed of by the United States before the passage thereof, except those released by the resolution of March 2, 1861, (1862 miscalled in the act) the Secretary of the Interior was directed to set apart an equal amount of lands lying within the State, to be certified in lieu thereof, and if the State had sold any part of the lands lying within the limits of the grant, the title of which had proved invalid, and any land which should be certified to
60 the State in lieu thereof, by the provisions of said act, should be held as a trust fund for the benefit of the persons whose title had failed.

At the date of this act, the Supreme Court, in the case of Litchfield *vs.* Dubuque & Pacific Railroad Company, 2 Black, 66, had decided that the grant of 1846 did not extend above the Raccoon fork, and that the title of the Des Moines Navigation and Railroad Company to such lands as had been certified and conveyed to them above the

Raccoon fork, had failed. This decision was made at the December term of the court in *in* 1859. The court in said cause held that the setting apart of these lands by Stuart, Secretary of the Interior, was a null and void act, and implied that the railroad company was entitled to the lands in dispute under the act of 1856. Under the act of July 12, 1862, the State of Iowa, through its officers and the Secretary of the Interior, treated the title of the Dubuque & Sioux City railroad, under the act of 1856, as a good title. The State of Iowa passed resolutions appointing Josiah A. Harvey register of the State land office, a commissioner to adjust with the General Government the claims of the State under the act of July 12, 1862, and on the 22d of May, 1866, the said commissioner and State of Iowa did adjust and settle the claim of the State under the resolution of March 2, 1861, and act of July 12, 1862, by a paper-writing, which was approved by the State of Iowa on the 20th of June, 1866. Both the Secretary of the Interior and the State of Iowa, in said settlement, treated the lands claimed by the plaintiff as having been sold or disposed of by the United States, under the act of 1856, to the Dubuque & Sioux City Railroad Company, and the Secretary of the Interior set apart an equal amount of lands in lieu thereof, which were held by the State in trust for the parties whose title had proved invalid, which title so proved invalid *were* — the Des Moines Navigation and Railroad Company.

The lands referred to in the resolutions of March 2, 1861, were settled by the State and the Secretary of the Interior, and were entirely different lands from those claimed by the Des
61 Moines Navigation Company. The settlement of 1866 contained the following distribution of lands:

"*Adjustment of Iowa Des Moines River Grant under Act of July* 12, 1862, *and Joint Resolution of March* 2, 1861.

"DEBIT.

	Acres.
"The State of Iowa, the quantity of indemnity lands selected under special certificate dated April 25, 1863	297,603 74
"The lands in place (meaning by 'in place' the odd sections not sold by Congress within limits of grant)	167,109 02
"The lands in place confirmed by joint resolution, March 2, 1861	44,838 64
"The quantity selected on the east fork Des Moines river, and certified to the State under original act of Aug. 8, 1846	11,661 80
"The excess selected and approved to State under its 500,000-acre grant	35,473 54
	"556,686 74
"Remains due State	1,317 32
	"558,004 06

"CREDIT.

	Acres.
"Whole area of grant above Raccoon fork	558,004.09"

By the act of the 12th of July, 1862, and said settlement, the State of Iowa became the trustees of the Des Moines Navigation and Railroad Company and its assigns, for so much of said lands above the forks as the State had conveyed to them, a part of which (about fifty thousand) east of the Des Moines, was conveyed by the Secretary of the Interior and the State to the Dubuque & Sioux City Railroad Company; and, if the latter company's title failed, and the Des Moines Navigation Company's title was good, then a trustee for plaintiffs in this suit.

As to these lands claimed by the plaintiffs west of the Des Moines river, the navigation company has never claimed them. The Des Moines Valley Railroad Company has disclaimed any title as to part of them, and claims title as to part. If they now assert any, they have none, they having received from the State indemnity lands in lieu thereof, which is, in law, a complete bar to their claim. Plaintiff prays that they may disclose what part they claim, if any.

The State of Iowa has recently conveyed by quitclaim, all
62 its title to the indemnity lands, under the act of July 12, 1862; but as to such of said lands as were held in trust by the State for parties whose title had failed, the conveyance, by quitclaim, does not pass the title held in trust; and if it did, the Des Moines Valley Railroad Company holds them also in trust, and for no other purpose.

The said Des Moines Valley Railroad Company have executed a deed of trust to M. D. Gilman and N. A. Crowdey of all such lands as they had or might obtain from the State for building their road, and no other.

After the passage of the act of July 12, 1862, and the acceptance thereof by the State of Iowa, and the settlements of May, 1866, Samuel G. Wolcott, a citizen of New York, claiming to be a purchaser of the east ½ of section 17, t'w'p 88 north, range 27 west, in the county of Webster, Iowa, from the Des Moines Navigation Company, by deed of date of August 1, 1859, brought a suit in the circuit court of the United States for the southern district of New York, against the Des Moines Navigation and Railroad Company, for a breach of warranty of title. This suit was brought by Wolcott, in New York, by consent of the Des Moines Navigation Company, outside of the jurisdiction of the State of Iowa, by the laws of which it was created, and where alone it could reside and be sued on such a contract, and was designed and intended by the parties to make an agreed case to settle the construction of an act of Congress, in which bill the plaintiff and defendant had the same interest, adverse to the claim of the plaintiffs in this suit, in which they jointly paid the costs, and the attorneys employed were both really interested on the same side, and their object was to obtain an adjudication of the rights of the plaintiff and others who were like situated and were not before the court. Though the suit was commenced before the

settlement under the act of July 12, 1866, it was not decided in the supreme court until after the settlement under that act. The rights of the plaintiff, as herein declared, were not set forth in the pleadings or alluded to by the court. The settlement of 1856 and the construction of the act of 1862 by the State and Federal gov-
63 ernment were not known to the court, and the decision in that case is no bar nor precedent to control the action of this court on the question now presented. The decision of the supreme court in that cause, holding the Des Moines Navigation Company's cause good, was made at the December term of the supreme court for 1866.

After the settlement of the State with the Des Moines Navigation Company — conveyed certain parcels of the lands now claimed by the plaintiff to the following persons, among others: Samuel G. Wolcott, Wm. B. Welles, Roswell Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, and John Stryker. These parties, and others not known to the plaintiffs, have commenced a very large number of actions at law in this court, the plaintiff is informed, to the number of one hundred and fifty, against persons claiming both from the plaintiffs, or otherwise, to eject them from the lands owned by the plaintiffs. A great many more actions at law have been commenced against other parties involving the same title; and actions at law are threatened to be brought directly against the plaintiff for the lands in dispute, which they have not contracted to sell, and of which they are in nominal possession, on which they pay taxes. A list of some of these suits, and the names of the parties and description of the lands claimed are hereto annexed and made a part of this bill. The Des Moines Navigation Company have also begun suits at law against claimants under the plaintiffs, or for the plaintiffs' lands, which will appear by said list. These purchasers from the navigation company are said to be, and the plaintiff so charges were stockholders in the corporation, and held the title to the lands claimed by them for their share, or parts of it, of stock in the corporation. Neither the navigation company nor the stockholders thereof were purchasers without notice. They knew the construction put on the act of Congress before they made their contract with the State, and they
64 knew of the passage of the act of 1856, and its construction, before they made the settlement and received the conveyance from the State.

The Secretary of the Interior, O. H. Browning, at one time construed the decision in Wolcott's case to entitle the United States to all the lands claimed by the plaintiff, because the State had got other lands in lieu thereof—one on the act of July 12, 1862; and he has allowed parties to apply for pre-emption to the lands claimed by plaintiff. He has reversed his decision, in part, but the parties named as pre-emptors still claim title to the property adversely to the plaintiffs. A list of said applicants is hereto annexed and made part thereof.

The Des Moines Valley Railroad Company, formerly the Keokuk,

Fort Des Moines & Minnesota Railroad Company, have obtained a quitclaim deed for, and claim title to, not only all the lands certified to the State of Iowa under the settlement of 1866, between the State and Federal governments, which were set apart to them within the limits of the grant, called lands in place, but they claim title to all the lands certified to the State in trust for these parties to whom the State had conveyed title, and which failed. The State of Iowa has accepted the trust, and, any persons claiming to hold any of the trust lands, hold them subject to the trust. There has been no separation of these held in trust, for the bad title, from the others.

The plaintiffs allege that theirs is the better title to the lands claimed by them. A list of those conveyed to the Dubuque & Sioux City Railroad Company within the limits of the Des Moines river grant, on each side of the river, is made out in separate tracts, and made part of this bill. Copies of the plaintiff's title deeds and certificates are also annexed and made part of this bill. The plaintiff also attaches to this bill and makes part thereof, a list of the suits at law begun as herein set forth in part, certificates of the governor of Iowa and the Secretary of the Interior, conveying title to the Dubuque & Sioux City Railroad Company; copies of the settlement of the State of Iowa and the United States under the resolutions of March 2, 1861, and July 12, 1862; copies of the
65 acts of Congress and legislature of Iowa, which relate to the controversy; copies of the correspondence of various public officials, which relate to the subject, and makes them all a part of this bill.

The plaintiffs allege that the title claimed by the Des Moines Navigation Company and their vendees, Wolcott, Welles, Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield and John Stryker, is the inferior title, and one which the State had conveyed away and failed, and referred to in the act of July 12, 1862. That the Des Moines Valley Railroad Company have no title to either the lands claimed by the plaintiff or to the lands conveyed to the State in trust for the party whose title had failed; and, if they have any legal title to such, they hold it in trust for the navigation company and their assignees, or for the plaintiff. If the plaintiff's title is the one that has failed, and referred to in the act of July 12, 1862, then the State is the trustee of the plaintiff. The Des Moines Valley Railroad Company held the residue undivided, and are bound to surrender all claim derived from the State by their deed to the plaintiff, and are bound to consent to a severance of the lands belonging to the plaintiff in such case from the residue. Thomas Colter, Jacob Crouse and John P. McDermott have no right to the pre-emptions claimed by them.

The said plaintiffs have been in possession of the lands claimed by them, themselves, or their vendees in contract, since 1861. They have paid the taxes thereon to the State of Iowa since, in all amounting to eighty thousand dollars; and, if their title has failed, they

are entitled to have their taxes refunded since 1861 by the holder of the legal title, who has not paid them.

The plaintiff says he has no adequate remedy for the grievances complained of, except in a court of equity. He makes the Des Moines Navigation and Railroad Company, Samuel G. Wolcott,
66 Wm. B. Welles, Roswell Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade and John Stryker, the Des Moines Valley Railroad Company, and Thomas Colter, Jacob Crouse, John P. McDermott, parties defendant to this suit, and prays for a writ of subpœna against them, returnable to the next term.

The plaintiff prays that said parties may be enjoined from prosecuting said actions, or any other actions at law, in relation to the title or possession of any of said lands until the final hearing of the bill, that the injunction be made perpetual; that said defendants, Colter, Crouse and McDermott, be enjoined perpetually from prosecuting any pre-emption to any said lands; that the conflicting acts of the Secretary of the Interior and judicial decisions may be finally interpreted; that the plaintiffs may be quieted in their title and possession to said lands on both sides of the river; or, if the plaintiff's title to said lands is not the better title, and his title to said lands is the title conveyed by the State, and failed under the right interpretation of the acts of 1846, 1856 and 1862, that his title to an equal number of acres, in lieu thereof, be decreed and established; that an account be taken of said indemnity lands, and the Des Moines Valley Railroad Company be decreed to make partition thereof, and set apart and convey or relinquish to the plaintiff such lands as the plaintiff may be entitled to under said act of July 12, 1862, (the State being acting trustee to do justice in the premises, and to convey to such party as may be established the true beneficiaries under said act); that in the event of a decree that the plaintiff's present title or any part of it has failed, that the said Des Moines Navigation and Railroad Company and its assigns may be decreed to repay to the plaintiffs all taxes which he has paid on said lands, and interest thereon.

And that said Des Moines Valley Railroad Company be decreed to release to the plaintiff all claim to the indemnity lands set apart to the plaintiffs, and for such other relief as the nature of the plaintiff's case may require.

GRANT & SMITH,
Attorneys for Plaintiff.

Comes the plaintiff, October 23d, 1860, and by leave of
67 court and consent of counsel, files the following amendment to his bill, to wit:

Circuit Court of the United States, District of Iowa.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

The plaintiff by leave of court and agreement of counsel amends his description of the property in dispute, by adding after the first clause of the bill, the following words:

That said lands in dispute and claimed by the Des Moines Navigation and Railroad Company and its assignees, are the odd sections in townships 86, 87 and 88, ranges 27, 28, 29 and 30, west, which lies south on the second correction line, within five miles of the Des Moines river, and townships 89, 90, 91 and 92, ranges 28 and 29, east of the Des Moines river, within five miles of the east branch thereof.

The lands to which the Des Moines Valley Railroad Company make some claim, are the odd-numbered sections in townships 89 and 90, ranges 28 and 29, which lie west of the Des Moines river and within five miles thereof.

GRANT & SMITH.

The amendment being made to correct and simplify a description of the lands in controversey, is conceded to be true without formal answer.

The defendant read from the same record the answer of William B. Welles, one of the defendants in said suit, as follows:

United States Circuit Court, District of Iowa.

THE IOWA HOMESTEAD COMPANY, Complainant,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Samuel G. Wolcott, Wm. B. Welles, Roswell Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, and Others, Defendants. } In Equity.

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The several answers of the defendant Wm. B. Welles to the bill of complaint of The Iowa Homestead Company, complainant.

This defendant, Wm. B. Welles, now and at all times hereafter saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereto or unto so much or such parts thereof as this defendant is advised is material for him to make answer unto, answers and says: That he is informed by complainant's said bill of complaint, and believes to be true, that the said Iowa Homestead Company is a corporation created by the laws, and a citizen of the State of Iowa, for the purpose of

buying and selling lands in said State, but as to whether or not said corporation was duly created and organized by a full and complete observance of the requirements of the statutes of said State authorizing and providing for the organization and formation of corporations, this defendant has not sufficient knowledge or information to form a belief.

And this defendant says that, as to whether or not said complainant, by deed of purchase bearing date November 12, 1863, acquired by and through the Dubuque & Sioux City Railroad Company, all the rights of the said company, and the Dubuque & Pacific Railroad Company to about fifty thousand acres of land lying on the east side of the Des Moines river, in Webster and Humboldt counties, Iowa, being the odd sections of land within the limits of the Dubuque & Pacific railroad grant of 1856, and of the Des Moines river grant of 1846, as in complainant's bill alleged, the defendant is ignorant and uninformed save by complainant's bill of complaint, and leaves complainant to proof thereof; but he expressly denies that by such deed or deeds of purchase, or otherwise, the said complainant ever acquired the right and title of the State of Iowa to the said fifty thousand acres as in complainant's bill claimed.

69 And this defendant, further answering, admits that the said Des Moines Navigation and Railroad Company is a corporation created by the laws of the State of Iowa, and the said company and its grantees claim the said fifty thousand acres of land in the said bill of complaint, and the lists therein referred to and thereto annexed and described, or so much and such parts and portions thereof as were certified and approved to the State of Iowa, under the act of August 8, 1846, and conveyed to the said Des Moines Navigation and Railroad Company by the State of Iowa, and subsequently confirmed by the joint resolution of March 2, 1861, and the act of Congress of July 12, 1862, as hereinafter stated and set forth; and this defendant alleges and avers that the said Des Moines Navigation and Railroad Company and its grantees claim all the lands lying in the alternate odd-numbered sections within five miles of the Des Moines river, and on the east side thereof, and in the said counties of Webster and Hamilton, and Humboldt as far north as the north line of township 92, and on the west side thereof as far north as the second correction line, and have full and complete title thereto, as hereinafter stated and set forth.

And this defendant admits the passage by Congress of the said act of August 8, 1846; that on the 24th of February, 1847, the State of Iowa appointed a board of public works to improve the navigation of said (Des Moines) river, and that on the 23d day of February, 1848, R. M. Young, Commissioner of the General Land Office, addressed to the secretary of the said board of public works a letter containing the language quoted in complainant's bill stated and set out.

And this defendant admits that on or about the 17th of October, 1846, the governor of the State of Iowa was notified by James H. Piper, acting Commissioner of the General Land Office, by letter, that

"under the grant of August 8, 1846, the Territory of Iowa was entitled to the vacant lands in the alternate sections within five miles on each side of the Des Moines river, from the northern boundary of Missouri to the Raccoon fork of the Des Moines river," but, upon information and belief, he denies that the territorial and
70 State authorities acquiesced in the opinion expressed in said letter so far as it implies that the grant extended only to the Raccoon fork.

And this defendant admits that on the 19th of June, 1848, the President, by proclamation, ordered into market some of the lands in the odd-numbered sections above the Raccoon fork; that the board of public works in Iowa protested against this; that on the 8th of January, 1849, the delegation in Congress from Iowa, called the attention of the Secretary of the Treasury to the construction of the act of August, 1846, claiming that the odd sections above the Raccoon fork, which had been ordered into market by the President, belonged to the State of Iowa under the said grant of August 8, 1846, and that R. J. Walker, Secretary of the Treasury on the second day of March, 1849, held and decided that the said grant of August 8, 1846, extended to the source of the Des Moines river.

And this defendant admits and alleges that on the 2d of March, 1849, R. J. Walker, Secretary of the Treasury, communicated to R. M. Young, Commissioner of the General Land Office, his said decision in respect to the extent of said grant, and instructed him to be governed thereby, and that on the 16th of June, 1849, the said Commissioner withdrew the said lands in the said odd-numbered sections above the Raccoon fork from sale, pursuant and in obedience to the said instruction of Secretary Walker, and on the same day the said Commissioner advised the land officers in the State of Iowa, having in charge the sale of the public lands above the Raccoon fork, in the State of Iowa, of the decision of the Secretary of the Treasury, and directed and instructed them accordingly to withdraw from market and withhold from sale the lands in the odd-numbered sections above the Raccoon fork and within five miles of the Des Moines river.

And this defendant further answering admits that on or about the 14th of January, 1850, the Commissioner of the General Land Office informed Ewing, Secretary of the Interior, that the lands charged against the State of Iowa amounted to 825,078 acres, and
71 when the grant was adjusted the amount between the Raccoon fork and the source of the river was estimateed to contain 900,000 acres.

And this defendant, further answering, says that as to whether or not the Commissioner of the General Land Office on the 13th of March, 1850, submitted to Secretary Ewing three lists of lands showing the tracts falling within the limits of the grant above the Raccoon fork, as in complainant's bill alleged, he is ignorant and -informed, save by the complainant's bill of complaint; he admits, upon information and belief, that on the 6th of April, 1850, Secretary Ewing addressed to the Commissioner of the General Land Office the letter, of which a copy, in substance, is set out among the

exhibits annexed to complainant's printed bill at pages 64 and 65 thereof, but he denies that said Ewing, by said letter or otherwise, revoked the decision of Secretary Walker, and denies that he had any authority to review or reverse the decision of Secretary Walker, which had been acted on and carried out, and that his said letter or any act or order of his whatever could affect or reverse the said decision of Secretary Walker.

And this defendant, further answering, admits that on the 19th of July, 1850, Reverdy Johnson, Attorney General, upon submission of the question to him by the President, gave and rendered his opinion, that the grant of August 8, 1846, extended above the Raccoon fork to the source of the river; that on the 30th of June, 1851, Crittenden, Attorney General, expressed the opinion that the grant did not extend above the Raccoon fork; that on the 29th of October, 1851, Stuart, Secretary of the Interior, addressed to the Commissioner of the General Land Office the letter, of which a copy is set out among the exhibits annexed to complainant's printed bill on file, on pages 65 and 66, in which he directed said Commissioner to select and report for his approval a list of the alternate sections of land claimed by the State of Iowa above the Raccoon fork, under the said grant of August 8, 1846, and this defendant alleges and avers that said Secretary Stuart, by his order and direction in said letter, contained, expressly and distinctly recognizes the acts of Secretary Walker in the premises as valid and binding upon
72 the United States, and directly recognizes the validity of the claim of the State of Iowa, under the said grant of August 8, 1846, to lands lying in the alternate odd-numbered sections above the Raccoon fork, and within five miles of the Des Moines river, including those claimed by the complainant in this action as against the said Des Moines Navigation and Railroad Company and its grantees.

And this defendant, further answering, admits that the Supreme Court of the United States, at the December term, 1859, and on or about the 9th day of April, 1860, in the case of Litchfield *vs.* The Dubuque & Pacific Railroad Company, held and decided that the grant contemplated by the act of August 8, 1846, did not extend above the Raccoon fork.

And this defendant, further answering, admits and alleges that on the 30th of October, 1851, the Commissioner of the General Land Office and the Secretary of the Interior, certified and approved to the State of Iowa, under the said grant of August 8, 1846, of the lands lying in the alternate odd-numbered sections above the Raccoon fork, 214,391.58 acres, and on the 10th of March, 1852, the further quantity of 143,908.37 acres; and on the 17th of December, 1853, the further quantity of 38,142.43 acres; and on the 30th of December, 1853, the further quantity of 12,813.51 acres.

And this defendant, further answering says, that he is ignorant and uninformed, save by the said complainant's said bill of complaint, as to whether or not the Commissioner of the General Land Office on the 21st of March, 1856 decided that the grant of August 8, 1846, did not extend above the Raccoon fork. Upon information

and belief he admits that Attorney General Black, in his letter of November 22, 1858, expressed the opinion that the grant of August 8, 1846, did not extend above the Raccoon fork; but upon information and belief he denies that the Secretary of the Interior on the 7th of May, 1858, rejected the claim of the State of Iowa to the lands above the Raccoon fork which had been certified to the State as aforesaid.

And this defendant, further answering, admits that the Con-
73 gress of the United States, on or about the 15th of May, 1856, passed and enacted the act entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," and that a copy thereof is set out as an exhibit to complainant's bill in the printed copy thereof on file, at pages 127, 128, and 129 thereof, and also admits that, on or about the 14th of July, 1856, the General Assembly of the State of Iowa passed the act entitled "An act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State,'" approved May 15, 1856, and that a copy of the said act of the General Assembly is substantially set out in complainant's printed bill at pages 129, 130, 131, 132, 133 and 134 thereof, but this defendant expressly denies that, under and by the said act of Congress and the said act of the General Assembly, or either of said acts, either the State of Iowa or the Dubuque & Pacific Railroad Company, or the plaintiff obtained or acquired any title or interest in the lands claimed by the plaintiff in this action which had been previously certified and approved to the State of Iowa by the Commissioner of the General Land Office or the Secretary of the Interior, under the said act of Congress of August 8, 1846; and this defendant expressly alleges and avers that all the lands in complainant's bill of complaint designated, specified and claimed by plaintiff, which had, previous to the passage of said act of Congress of May 15, 1856, been certified to the State of Iowa under the said grant of August 8, 1846, as hereinafter stated (being the lands lying in the alternate odd-numbered sections within five miles of the Des Moines river) had been and at the time of the passage of said act of May 15, 1856, were expressly reserved to and by the United States by competent authority, and by the last proviso in section one of said act were expressly reserved from the operations and effect of the said act, and the same being so reserved never passed to the State of Iowa under the said act of May 15, 1856 and by the said act the State of Iowa acquired no title to the said land for the purpose of said act or otherwise, and the State of Iowa was
74 not authorized by the said act of May 15, 1856, to dispose and certify, or to convey or authorize to be conveyed, to the said Dubuque & Pacific Railroad Company, or to any corporation or person whatsoever, the said lands in the said alternate odd-numbered sections, embraced in the limits of the lands certified and approved to the State of Iowa under the said grant of August 8, 1846, or any part or parcel or portion thereof.

And this defendant, further answering, says that as to whether or not a plat of the Dubuque & Pacific Railroad Company was, on the 18th of April, 1857, presented by the governor of Iowa to the Secretary of the Interior and the alternate sections on the line thereof designated and set apart by him to the State of Iowa, under the grant of May 15, 1856, this defendant is ignorant and uninformed save by said complainant's bill of complaint, but, upon information and belief, he denies that the State of Iowa asked, and the Secretary of the Interior reserved, the lands (so far as the same had been certified to the State of Iowa under the grant of August 8, 1846) within five miles of the Des Moines river above the Raccoon fork for the railroad instead of the river grant.

And this defendant, further answering, upon information and belief, alleges and avers that the said Dubuque & Pacific Railroad Company, and the Dubuque and Sioux City Railroad Company nor either of said companies ever complied with and performed the conditions and requirements of the said act of the General Assembly of July 14, 1856, to entitle them to the lands in controversy in this suit thereunder, but utterly failed to complete and construct their road, as and in the manner and at the time and times in said act specified; and this defendant expressly denies that, by anything in the said act of Congress of May 15, 1856, and the act of the General Assembly of the State July 14, 1856, contained, or by anything done by said Dubuque & Pacific Railroad Company, or the said Dubuque & Sioux City Railroad Company, or the governor of Iowa, or the Secretary of the Interior, or as in complainant's bill alleged, the State of Iowa, or the said railroad company ever acquired any title to or interest in the lands lying in the alter-
75 nate odd-numbered sections within five miles of the Des Moines river, and certified to the State of Iowa by the Secretary of the Interior, under the said grant of August 8, 1846, as hereinafter stated and set forth.

And this defendant denies that, after the opinion of Attorney General Black in 1858 the State of Iowa and the Secretary of the Interior treated the said lands certified to the State under act of August 8, 1846, as belonging to the railway, and not to the river grant, and upon information and belief, he denies that an application of the Des Moines Navigation Company for a title as assignee of the State was refused by the Secretary of the Interior as in complainant's bill alleged, and this defendant further answering says that he is informed and believes to be true, and therefore alleges and avers that the said Des Moines Navigation and Railroad Company uniformly, after the said lands were certified to the State under the said act of August 8, 1846, and sold and conveyed to the said company by said contract of June 9, 1854, and by the deeds to said company as hereinafter stated, claimed and insisted that they had and held full, absolute and complete title to said lands; that with the sole view of procuring evidence to said company directly of the title to said lands, said company, by Reverdy Johnson, their attorney, about the year 1856, applied to the Secretary of the Interior to issue patents for said lands directly to said company, but

said Secretary declined and refused to issue said patents, for the reason that the United States had no title thereto, having by the certificates of said lands to the State under the act of August 8, 1846, parted with its title to the said lands.

And this defendant denies that, on the 11 of April, 1863, the Commissioner of the General Land Office certified that the Dubuque and Sioux City Railroad Company were entitled to the lands now claimed by plaintiff as purchasers of the Dubuque and Sioux City Railroad Company; and denies that the said Dubuque and Sioux City Railroad Company acquired title to said lands, when the certificate was given by the governor in 1861, as in complainant's bill alleged, and the defendant, upon information and belief, alleges
76 that the certificate given by the Commissioner of the General Land Office was given on or about February 26, 1863, a copy of which, in substance is set out in complainant's bill as an exhibit at pages 24 and 25.

And this defendant further answering says that, as to whether or not the Dubuque and Pacific Railroad Company in August, 1861 (or at any other time), was merged in a new company called the Dubuque and Sioux Ciy Railroad Company and which succeeded to the rights and obligations of the Dubuque & Pacific Railroad Company, this defendant is ignorant and uninformed, save by the said complainant's said bill of complaint, and he expressly denies that the completion of the said first five sections of twenty miles each, the Dubuque and Sioux City Railroad Company on the 25th of April, 1861, or at any other time, became, or that the said company or its grantees now is, entitled to the lands on both sides of the Des Moines river, now claimed by complainant in this action, and that this defendant is ignorant and uninformed save by complainant's said bill, as to whether or not the governor of Iowa on the 25th of April, 1861, certified that said Dubuque and Sioux City Railroad Company has completed the fifth continuous twenty miles of road west from Dubuque, as to whether or not said governor on the 29th day of July, 1865, certified that said company on the 2d of June, 1864, had completed the sixth section of twenty miles of said road west from Dubuque, as in complainant's bill alleged.

And this defendant, further answering, admits that on or about the 9th day of June, 1854, the State of Iowa made and entered into a contract with the Des Moines Navigation and Railroad Company, for the improvement of the Des Moines river and to convey to said company all the unsold lands above the Raccoon fork, which had been certified to the State under the said act of August 8, 1846; that the said company undertook and entered upon said work, and as the improvement progressed, the State, by its proper officers, issued to said company certificates of sale of about 205,489.64 acres of said lands, including those claimed by the plaintiff, east of the Des Moines river; and this defendant expressly denies that the
77 Commissioner of the General Land Office and the Secretary of the Interior refused to certify or convey the said lands to the State, or the Des Moines Navigation and Railroad Company, and alleges and avers that all said lands were duly certified

and approved to the State under the act of August 8, 1846, by said Commissioner and Secretary prior to the date of said contract with the State, June 9th, 1854.

And this defendant, further answering, denies that the State of Iowa and the said Des Moines Navigation and Railroad Company, in the settlement made under and in pursuance of the joint resolution of March 22, 1858, settled difficulties arising out of the construction of the grant of August 8, 1846, and he alleges and avers that the State then claimed to own and have the title to all the unsold lands which had been certified to it under the grant of August 8, 1846, and the settlement by and between the State and said company in pursuance of which the State conveyed the said lands to said company was simply a settlement of the claims made by said company for monies expended and work done, and materials furnished by said company, under its contract and the other claims referred to in said joint resolutions herein stated and alleged.

And this defendant, further answering, admits the passage by Congress of the joint resolution of March 2, 1861, but he denies that the said joint resolution was construed by the State of Iowa, and by Congress, through their executive officers, or otherwise, to refer only to lands above the Raccoon fork, conveyed to settlers and other individuals, and not to include the lands claimed by plaintiff in this action, and he expressly denies that at the date of said resolution the Dubuque & Sioux City Railroad Company had acquired from the State the title to the lands now claimed by the plaintiff in controversy, as against the Des Moines Navigation and Railroad Company and its grantees, or any part or portion thereof.

And this defendant, further answering, admits that at the date of said act of July 12, 1862, in said complainant's bill mentioned the Supreme Court, in the case of Litchfield *vs.* The Dubuque & Pacific Railroad Company, had decided that the grant of August 8,
78 1846, did not extend above the Raccoon fork, but he denies that such court, by implication or directly, in said cause held or decided that the said Dubuque & Pacific Railroad Company was entitled to the lands in dispute herein, under the act of 1856 or otherwise; but on the contrary, he affirms and alleges that the said Supreme Court, in the case of Wolcott *vs.* The Des Moines Navigation and Railroad Company, expressly held and decided that the said railroad company acquired no title to or interest in the said lands whatever, under the said act of May 15, 1856, and that the same by the terms of the proviso, and exception in said act contained, were expressly reserved from the operation of said act from the grant therein contained.

And this defendant, further answering, admits that the State of Iowa appointed Josiah A. Harvey, register of the State land office, a commissioner to adjust the claims of the State, under the grant made to the State, and that the act appointing said Harvey such commissioner was passed and approved March 30, 1866; that said Harvey, as such commissioner, as this defendant is informed and believes to be true, assumed on behalf of the State to make adjustments of the several grants to the State, but whether such adjust-

ment is truly and correctly set out in complainant's bill, this defendant has no knowledge or information, save that implied by the allegations in the said complainant's said bill of complaint, but this defendant expressly alleges and avers that such assumed and pretended adjustment was not made until long after the title to the lands in dispute had, by the joint resolution of March 2, 1861, and the act of July 12, 1861, (heretofore referred to,) been confirmed to the State and its grantees, and not until the month of June, 1866; and he expressly alleges that at the time of such assumed or pretended adjustment, the title to the lands in dispute had wholly and absolutely passed from the State of Iowa, and then vested that the deeds or patents executed by the State to said company, and by said company to its several grantees, as herein stated, covering the lands in dispute, as against this defendant, were then in full force, having never been judicially set aside, and were and are
79 conclusive as against the State, and that neither the State of Iowa nor its agent, the said Harvey, nor the census board of the State, nor the General Land Office and Secretary of the Interior, had any power, authority, or control over said lands in dispute, and that any adjustment made by them, or any of them, in respect to said lands, did and could in no way operate to impair or affect or disturb the title of the Des Moines Navigation and Railroad Company and its grantees to the said lands, but that such adjustment, so far as said company and its grantees are concerned, was and is of no binding force or obligation whatever, but was wholly and entirely nugatory and void.

And the defendant, further answering, expressly denies that the lands referred to and covered by the resolution of March 2, 1861, were different lands from those claimed by the Des Moines Navigation and Railroad Company, and he avers and alleges that the lands in dispute herein, so far as conveyed to said company, are part and parcel of the lands in said joint resolution referred to as having "been certified to the State improperly by the Department of the Interior as a part of the grant by act of Congress, approved August 8, 1846," and held by *bona fide* purchasers under the State of Iowa, and that the confirmation of the same to the State of Iowa by the joint resolution vested the title therein in the grantees of the State, the said Des Moines Navigation and Railroad Company and its grantees, absolutely and beyond all control of the State or the United States.

And in support of the proposition that the lands included in and covered by the joint resolution of March 2, 1861, were the same lands now claimed by the Des Moines Navigation and Railroad Company and its grantees, including those in dispute in this action, this defendant alleges and avers that the Commissioner of the General Land Office, on the 26th day of June, 1862, for the purpose of enabling the Land Department at Washington to determine what part and portions of the said lands which had been "certified to the State" had, by the State been conveyed to *bona fide* purchasers under the State, addressed to the governor of Iowa an official letter
80 requesting the governor "to furnish his office with a list of

the tracts referred to in said resolution and held by *bona fide* purchasers under the State of Iowa on the 2nd of March, 1861, and to certify the same under his official seal, specifying in each case the date of sale, name of purchaser, consideration, and the date of the patent or deed of conveyance by the State;" and that copy of said letter is set out among the exhibits to complainant's bill, on page 105 of the printed bill of complaint, and to which letter this defendant prays leave to refer; that afterwards, in compliance with the request of said Commissioner, the governor of Iowa did furnish to said Commissioner the lists called for by the letter of the said Commissioner, duly certified, which said lists so furnished and certified by the governor, are now on file in the office of the Commissioner of the General Land Office, and to which, for greater certainty, this defendant prays leave to refer, and that said lists covered and embraced and included all the lands now claimed by plaintiff in this action, as against the said Des Moines Navigation and Railroad Company and its grantees.

And this defendant, further answering, admits that, after the passage of the act of July 12, 1862, Samuel G. Wolcott, a citizen of New York, claiming the east half of section 17, township 88, (instead of 87, as complainant's bill alleged,) range 27 west, in the said county of Webster, under purchase from the said Des Moines Navigation and Railroad Company, brought suit in the circuit court of the United States for the southern district of New York against said company for a breach of warranty of title, and that in said action the title of the said Des Moines Navigation and Railroad Company was, by the Supreme Court of the United States, held good and valid, and this defendant, upon information and belief, denies that the said suit was designed and intended by the parties thereto as an agreed case to settle the construction of an act of Congress, in which bill the plaintiff and defendant had the same interest adversely to the claim of plaintiff in this suit, and also, upon such information and belief, denies that both parties jointly paid the costs, and
81 that the attorneys employed were both really interested on the same side, and that the object was to obtain an adjudication of the rights of the plaintiff and others who were like situated, and who were not before the court; and he expressly alleges and avers that said suit was commenced in good faith, and for the purpose indicated by the pleadings therein, and was conducted without collusion and without any fraud upon the rights of the plaintiff or others interested, or claiming to be interested therein.

And this defendant, further answering, alleges and avers that, after the commencement of said suit by said Wolcott against the said Des Moines Navigation and Railroad Company, and before the same was determined, and while the same was pending, the said Dubuque & Sioux City Railroad Company, under which the plaintiff herein claims title, applied to the court to intervene as a party interested in the controversy therein; that such application was granted, and the said railroad company made a party defendant; that the said railroad company, the grantors of the plaintiff herein, as this defendant is informed and believes to be true, and there-

fore alleges an- avers, made such application to be made party defendant, and was so made such party with the full knowledge and consent and at the desire and instance and request — the said Iowa Homestead Company—the complainant in this action—for the purpose of protecting the interest- of said homestead company, as well as those of said railroad company, in the premises; that, on application, time was given the said railroad company to prepare for the trial thereof; that the said railroad company as such party was fully heard and represented, and its claims to said lands and title thereto litigated by said company, and passed upon and decided by said supreme court adversely to the claims of said railroad company; that in such action the said railroad company relied upon and argued the same title or claim to title as is now urged and relied upon by the plaintiff herein; that the decision of the said court in said action is conclusive and decisive, and *res adjudicata*, so far as the claims of plaintiff in this action *is* concerned, and this defendant avers and insists that the said
82 action, and the decision of the said court therein, is a full and perfect and a complete bar to the maintenance of this action by the plaintiff and decisive of the plaintiff's claim herein.

And this defendant, further answering, admits that, after the settlement of the State with the Des Moines Navigation and Railroad Company, 1858, the said Des Moines Navigation and Railroad Company conveyed certain parcels of the land claimed by plaintiff to Samuel G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, and John Stryker, but he denies that said company conveyed any portion of said lands to the defendants, Albert H. Tracy, Francis W. Tracy, and Harriet Tracy, and upon information and belief alleges that the said defendants, Albert H. Tracy, Francis W. Tracy, and Harriet Tracy, hold and acquire their title to the lands claimed by them under and through Albert H. Tracy, the father of the defendants, Albert H. and Francis W., and the husband of the said Harriet Tracy, who was a grantee of said company; and this defendant alleges and avers that he, as well as the other grantees of the said Des Moines Navigation and Railroad Company, was and is a *bona fide* purchaser of the tracts respectively conveyed to them by the said Des Moines Navigation and Railroad Company under the State of Iowa, and he expressly denies the allegation in the complainant's said bill of complaint, averring that he or either of the other defendants are not *bona fide* purchasers of the tracts claimed by them respectfully.

And this defendant, further answering, denies that the defendants, who are purchasers from the Des Moines Navigation and Railroad Company, received or hold the title to the lands respectively claimed by them for their share or shares of stock in said corporation as in complainant's bill alleged, and denies that he is, or that any of such defendants are, purchasers, with notice of complainant's alleged equities; and he expressly alleges and avers that the said Des Moines Navigation and Railroad Company was, and is a *bona fide* purchaser of all the lands con-

veyed to it by the State of Iowa, as herein stated, including
83 those in dispute in this action, for a good and valuable consideration, without notice; that said consideration is found and appears in the said contract between the State of Iowa and the said company, under date of June 9, 1854, herein, and in complainant's bill referred to, and the work and labor performed, and expenditures incurred by said company thereunder, and the further consideration set forth and appearing in the said joint resolution of March 22, 1858, and the settlement thereunder; that the said act of May 15, 1856, which complainant claims to be the source and foundation of his title, was not passed until nearly two years after the date of said contract between the State and said company; that prior to and at the time of the passage of the joint resolution of March 22, 1858, and the settlement thereunder, and the execution of deeds or patents of the said lands by the State to said company, as herein stated, neither the agents and officials of the United States, or of the State, nor the Dubuque & Pacific Railroad Company, nor the Dubuque & Sioux City Railroad Company, nor their grantees, had ever made or asserted any title whatever to any of the lands so sold and conveyed to the Des Moines Navigation and Railroad Company, as herein stated, but the same were then held and claimed by the State under the said grant of August 8, 1846, and not otherwise.

And this defendant, further answering, says that as to the allegations in said complainant's bill of complaint, touching and relating to the claim and title of the Des Moines Valley Railroad Company to parts and portions of the lands claimed by said company, and by the plaintiff in this action (except so far as the same are conferred by the joint resolution of the General Assembly of the State of Iowa, of March 22, 1858, and set forth as an exhibit to complainant's bill), this defendant is ignorant and uninformed, save by the complainant's said bill of complaint, and as to those allegations he leaves complainant to make such proof as he shall be advised is material and necessary; and this defendant disclaims all title to, or interest in, such parts and portions of said lands.

And this defendant, further answering, says that he ad-
84 mits that the copies of instruments annexed as exhibits to the complainant's bill of complaint, so far as the same are pertinent and bear upon the controversy between the plaintiff and the Des Moines Navigation and Railroad Company and its grantees herein, are substantially copies of the originals of which they respectively purport to be copies.

And this defendant, further answering, denies that the title of the complainant to the lands claimed by these defendants, and by the Des Moines Navigation and Railroad Company and its grantees, is superior and paramount to that of the said company and its grantees; and he expressly denies that the plaintiff, by reason of the matters in said complainant's bill of complaint contained as against the said Des Moines Navigation and Railroad Company and its grantees, has any title whatever to the said lands claimed by said company and its several grantees, respectively.

And this defendant, further answering, says that as to whether or not the said complainant and its vendees has been in possession of and paid taxes on the lands claimed by them since 1861, to the amount of $80,000, this defendant is ignorant and uninformed save by the said complainant's bill of complaint; but he expressly avers that the possession of the said land by the said complainant and its vendees since 1861, is, and has been, unauthorized and wrongful, and the said complainant should be required to account for the use and rents and profits thereof to the proper owners, respectively, during the time they have been in such possession; and he also expressly alleges and avers that all taxes whatsoever, paid by said complainant, have been paid by complainant voluntarily, with a knowledge of all the facts, and that the complainant is not entitled to have the same or any part thereof refunded.

And this defendant, further answering, denies that the defendants in this action have commenced actions at law in this court against persons claiming title through plaintiff; or otherwise, to eject them from lands owned by the plaintiff; but he admits and avers that the said defendants have commenced actions in the district
85 counties of Webster and Hamilton, in their respective names, both at law and in equity, against persons in possession and persons claiming title to recover possession, or to qui-t title to the tracts of the said lands claimed by said defendants in said counties of Webster and Hamilton.

And this defendant, further answering, alleges and avers that on the 8th day of August, 1846, the Congress of the United States passed an act entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said Territory; that by the first section thereof there was granted to the said Territory the one equal moiety in alternate sections of the public lands, (remaining unsold and not otherwise disposed of, encumbered, or appropriated,) in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States; that by the fourth section of said act it was enacted and provided "that whenever the Territory of Iowa shall be admitted into the Union as a State, the land hereby granted for the above purpose shall be and become the property of said State for the purpose contemplated in this act, and no other, provided the legislature of the State of Iowa shall accept the said grant for the said purpose," (and to which said act for greater certainty this defendant refers;) that subsequently to wit, in December, 1846, the said Territory of Iowa was admitted into the Union as a State, and that after its admission as such, the State of Iowa, by a joint resolution of the General Assembly thereof, passed and approved January 9, 1847, accepted the said grant for the purposes in said act mentioned and specified.

And this defendant further shows that, pursuant to and in accordance with the provisions of the said act of August 8, 1846, the governor of Iowa appointed agents, who selected under the said act the

lands situated and lying in the alternate odd-numbered sections within the limits of the said grant, for and in behalf of the State, and that such selections when made were duly reported to the Commissioner of the General Land Office, and were duly approved
86 by him and by the Secretary of the Treasury of the United States; that such selections and approval were made in the year 1846, and after such approval, and on the 17th day of October, 1846, the Commissioner of the General Land Office instructed the register and receiver in Iowa, having charge and control over lands, to reserve from sale or entry of any kind all the unsold and unappropriated lands in the sections selected by the State of Iowa aforesaid. That on the 23d day of February, 1848, the Commissioners of the General Land Office held and decided that, under the said grant in said act of August 8, 1846, contained, the State of Iowa was entitled to the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river within the limits of Iowa, and that such decision is found and contained in the letter of Richard M. Young, Commissioner, a copy whereof is set out in the printed bill of complaint, at pages 56 and 57 thereof, and to which this defendant for greater certainty prays leave to refer.

And this defendant, further answering, alleges and avers that, on the 2d day of March, 1849, the Secretary of the Treasury of the United States held and decided that the said grant in the said act of August 8, 1846, contained, and thereby contemplated, "extended on both sides of the said river, from its source to its mouth, but not to lands on said river, in the State of Missouri," as will appear more fully by the letter of R. J. Walker, Secretary of the Treasury, to A. C. Dodge and others, a copy of which is set out in the printed bill of complaint on page 61 thereof, and to which this defendant for greater certainty prays leave to refer; that in pursuance and in accordance with the said decision of the Secretary of Treasury, the said Commissioner of the General Land Office, on the 1st day of June, A. D. 1849, directed and instructed the said register and receiver of the public lands at Iowa City, in the State of Iowa, to withhold from sale all lands situated in the odd-numbered sections within five miles of that (Des Moines) river, above the Raccoon fork, as will more fully appear by the letters of R. J. Walker to R. M. Young, Commissioner, and R. M. Young, Commissioner, to register and receiver at Iowa City, copies of which are
87 set out in the printed bill of complaint, on page 62 thereof, and to which for greater certainty this defendant prays leave to refer; that such direction and order of the Commissioner of the General Land Office was received by the register and receeiver of the United States land office at Iowa City, on the 16th day of June, 1849, and the said order was adopted and approved by the Secretary of the Treasury of the United States, the other officers of the United States, including the heads of departments having the charge and control of the public lands, and the same was continued, carried out, enforced, and acted upon by all succeeding Commissioners of the General Land Office, and by all succeeding Secretaries of the Treasury and of the Interior having charge and control of the pub-

lic lands, until the said lands lying in such alternate odd-numbered sections were duly certified and approved to the State of Iowa, under and for the purpose of said grant of August 8th, 1846, as more fully hereafter stated, as will more fully appear by reference to the original letters, orders and decisions of said commissioners and secretaries referred to, and to which for greater certainty this defendant prays leave to refer.

And this defendant, further answering, alleges and avers that all of the said lands which had been surveyed, lying in the said alternate odd-numbered sections above the Raccoon fork, were, by the Commissioner of the General Land Office, and by the Secretary of the Interior in October, 1851, March, 1852, December, 1853, and January, 1854, duly certified and approved to the State of Iowa, as having passed to said State under the said act of August 8, 1846, by lists or schedules thereof, duly certified and approved, and delivered to the State of Iowa by the said Commissioner of the General Land Office, under and with the approval and endorsement of the Secretary of the Interior, as will more fully appear by the said certified lists, to which for greater certainty the defendant prays leave to refer.

And this defendant, further answering, alleges and avers that the said Commissioner and Secretary of the Interior were the officers by law authorized and charged with the duty of approving
88 and certifying the said lands to the State under said grant, and that the lists or schedules so certified and approved to the State of Iowa under said grant, embraced and included, and covered the land claimed by the complainant in this action.

And this defendant further alleges that the said lists, and the certificates and the approval thereof, and of the lands therein described to the State by the said Commissioner and Secretary of the Interior, under the said grant of August 8, 1846, as aforesaid, have never been revoked, recalled, cancelled and annulled, but are still outstanding and operative, and in full force, and have since been fully confirmed by the Congress of the United States by a joint resolution thereof approved March 2, 1861, and by an act thereof passed and approved July 12, 1862; that at the time the said certified lists or schedules were prepared by the Commissioner of the General Land Office, the lands therein were duly marked and entered upon the books and plats of the General Land Office as having been granted to the State of Iowa for the purpose of the improvement of the Des Moines river, under the said act of August 8, 1846, and the same, since the said order of the said Commissioner on the 1st day of June, 1849, as aforesaid, have always and continually been considered, held and treated by the several departments of the Government as withheld and reserved from grant, sale, private pre-emption and homestead entry; that said lands, in fact, since the first of June, 1849, have been legally and continuously reserved by the United States by its duly constituted officers and departments, and the said order of reservation has never in anywise, form or manner, been recalled, revoked, cancelled or annulled; that at various times and dates since the said 1st day of June, 1849,

the Commissioner of the General Land Office and the Secretary of the Interior, being thereunto by law duly authorized and empowered, have recognized and approved, and affirmed, and continued the said order of reservation, and the same is still in force, all which will more fully appear by the respe-tive and several orders and letters, and official papers and documents of said officers re-
89 lating to the matter of such reservation, and to which for greater certainty this defendant prays leave to refer.

And this defendant, further answering, alleges and avers that subsequent to such reservation aforesaid, and after said lands were so certified and approved to the State of Iowa under the said grant of August 8, 1846, as aforesaid, and on or about the 9th day of June, 1854, the State of Iowa entered into a contract in writing with said defendant, The Des Moines Navigation and Railroad Company, for the sale, transfer and conveyance of all of the said lands in said certified and approved lists and schedules contained and described (except such parts and portions thereof as the State had sold and disposed of prior to the 23d day of December, 1853,) and to which said contract, for greater certainty, this defendant prays leave to refer.

And this defendant further alleges that, afterwards, for the purpose of a settlement with the Des Moines Navigation and Railroad Company under the said contract aforesaid, the General Assembly of the State of Iowa, on the 22d day of March, 1858, passed and adopted the joint resolution entitled "joint resolution containing proposition for a settlement with the Des Moines Navigation and Railroad Company," a copy whereof — set out in the printed bill of complaint at pages 116, 117, 118, and 119, and to which, for greater certainty this defendant prays leave to refer; that the said Des Moines Navigation and Railroad Company accepted the propositions for the settlement in the said joint resolution contained, in the manner therein specified and provided, and duely performed and complied with all the terms and conditions imposed upon it in and by said resolution, and in consideration thereof and of the said contract, and the work done by said company thereunder, and in pursuance of said joint resolution and the settlement thereunder, the State of Iowa, on or about the 3d day of May, 1858, by its deeds or patents duly executed and authenticated and delivered, granted, sold, and conveyed to the said company in fee simple all the said lands in said certified lists described which had not been sold by the State under the said grant of August 8, 1846, (excepting
90 about twenty-five thousand acres lying immediately above the Raccoon fork,) including the lands lying in the said counties of Webster and Hamilton, and claimed by the complainant in this action, and as will more fully appear by reference to said patents or deeds, and to which this defendant prays leave to refer.

And this defendant, further answering, alleges and avers that the said patents or conveyances from the State were made, executed, and delivered by the proper officers under the said joint resolution and the authority of the State, and upon a good and valuable consideration, and that the said company thereby became and was and

is a *bona fide* purchaser of the said lands under the State of Iowa; that, subsequent to such conveyance to the said Des Moines Navigation and Railroad Company by the State of Iowa aforesaid, the said company, for a valuable and adequate consideration to it paid by this defendant, duly bargained, granted, sold and conveyed to this defendant about eight thousand and five hundred acres of the said lands in Webster and Hamilton counties now claimed in this action by the complainant, as will more fully appear by the reference to the said deed from said company to this defendant, and to which this defendant prays leave to refer, and that this defendant is a *bona fide* purchaser of said tracts so conveyed to him by said company under the State of Iowa.

And this defendant, further answering, alleges and avers that at the December term of the Supreme Court of the United States of the year 1859, and late in the spring of 1860, the said court held and decided that the grant contained in and contemplated by said act of August 8, 1846, did not extend above the Raccoon fork; that at the subsequent session of the Congress of the United States, that body, for the purpose of protecting the purchasers under the State, including the Des Moines Navigation and Railroad Company and its grantees, and of carrying out and giving to said act of August 8, 1846, the construction and interpretation which had been given to said grant by the Commissioner of the General Land Office and the Secretary of the Treasury and the other officers as aforesaid, and
91 confirming the title to the same in the State and its grantees, under the act of August 8, 1846, and on the 2d day of March, 1861, passed and adopted the joint resolution entitled, "joint resolution to quiet titles in the State of Iowa," a copy whereof is set out in complainant's bill of complaint, at page 120 thereof.

And this defendant, further answering, alleges and avers that for the purpose and with the design and intent of extending the said grant of August 8, 1846, to the northern bound-ry of the State, and of confirming the same and the title to the State and its grantees thereunder, and for the further purpose of giving and adopting and carrying out the construction which had been placed upon and given to said act of August 8, 1846, by the said several officers and departments of the United States, and protecting the Des Moines Navigation and Railroad Company, and the grantees of the State, on the 12th day of July, 1862, passed and enacted the act entitled "An act confirming a land claim in the State of Iowa and for other purposes," a copy whereof is in substance set out in complainant's said bill of complaint, on page 126 thereof, and to which said act this defendant refers.

And this defendant, further answering, expressly alleges and avers that, by the said act of August 8, 1846, the reservation thereunder, as aforesaid, the acts of the several officers and departments of the United States and the State of Iowa aforesaid, the said contract of June 9, 1844, between the State and the said Des Moines Navigation and Railroad Company, the joint resolution of the General Assembly of the State of Iowa of March 22, 1858, and the settlement

and conveyance by the State as aforesaid, the joint resolution of Congress of March 2, 1861, and the act of Congress of July 12, 1862, directly extending and confirming the grant of August 8, 1846, as aforesaid, and the other matters above set forth, the Des Moines Navi- and Railroad Company acquired and obtained the full, complete and absolute title thereto, and are entitled to have, hold, possess and enjoy the respective tracts covered by the respective deeds.

92 And this defendant, further answering, denies that, under the said act of May 15, 1856, in said complainant's bill of complaint referred to, and the act of the General Assembly of the State of Iowa, approved July 14, 1856, and also in complainant's said bill of complaint referred to, or either of said acts, the State of Iowa acquired any title as trustee or otherwise to the said lands in complainant's bill charged to be claimed by the Des Moines Navigation and Railroad Company and its grantees and also in said bill claimed to be the property of complainant as against the Des Moines Navigation and Railroad Company; and this defendant expressly avers and insists that all of the said land in the alternate odd-numbered sections within five miles of the Des Moines river, and within the limits of the grant to the State for the use of the Dubuque & Pacific Railroad Company, as contemplated by said act of May 15, 1856, were expressly reserved and never in anywise passed to the State under the said act, as trustee or otherwise, in any matter whatever; and he alleges and avers that the title to the said lands in such odd-numbered sections is now, and for a long time has been by reason of matters in this answer stated and set forth, fully, completely, and absolutely vested in the said Des Moines Navigation and Railroad Company and its grantees, and that as against the claim of the said company and its grantees, the said complainant has no title to or interest in the said lands whatsoever.

And this defendant denies that the said complainant is entitled to the relief prayed in his bill of complaint herein, or any part thereof.

And this defendant says that he denies each and every material allegation in complainant's bill of complaint contained not hereinbefore well and sufficiently answered, confessed and avoided, traversed or denied, except the allegations relating to the Des Moines Valley Railroad Company and the lands claimed by said company, and in which this defendant claims no interest.

93 All of which matters and things this defendant is ready to aver, maintain, and prove as this honorable court may direct; and prays that, by reason of the said several matters aforesaid, the title of the defendant, The Des Moines Navigation and Railroad Company, to the lands herein claimed by said company, be by the decree of this court confirmed, and in all things held and declared valid and paramount, and that the respective titles of the other defendant named in this answer to the several tracts claimed by them respectively, be also, by a decree of this court, confirmed and held and declared valid and paramount and absolute, and that these defendants may have such other and further relief as is agree-

able to equity and the practice of this court, and that they be hence dismissed with their costs herein most wrongfully sustained.

J. M. ELLWOOD,
Solicitor for Defendant.

D. O. FINCH, *Of Counsel.*

United States Circuit Court, District of Iowa. In Equity.

THE IOWA HOMESTEAD COMPANY, Complainant,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Edwin C. Litchfield, Electus B. Litchfield, William J. McAlpine, Richard B. Chapman, Edward Wade and John Stryker, Defendants to the Bill of Complaint of The Iowa Homestead Company, Complainant.

These defendants, The Des Moines Navigation and Railroad Company, Samuel G. Wolcott, Edwin C. Litchfield, Electus B. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Edward Wade and John Stryker, now and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint, contained for answer thereunto or to so much and such parts and portions thereof, as these defendants are advised is material for them to make answer unto, answer and say that the foregoing and annexed answer of Wm. B. Wells, herein, save as herein otherwise stated and set forth truly and correctly sets forth all the facts, and contains all the averments and allegations relied upon by these defendants, and each and every one of them as a de-
94 fense to the said complainant's bill of complaint. That the said answer of said Wells and the admissions and denials and affirmative allegations therein contained are true to the best knowledge and belief of these defendants, and that these defendants adopt the said answer of the said Wells as their answer to the complainant's said bill of complain*ant* save and except as herein otherwise stated and set forth.

And these defendants further answering, allege and aver that all the lands in and by the complainant's bill, claimed to be in dispute by and between the complainant and these defendants were by the State of Iowa duly granted and conveyed to the said Des Moines Navigation and Railroad Company by the State of Iowa as in the said answer of the said Wm. B. Wells fully stated and set forth, and that subsequent to such conveyance by the State to said Des Moines Navigation and Railroad Company the said company bargained, sold, granted and conveyed to these defendants respectively, separate and distinct tracts and parcels of said lands claimed by complainant as will more fully appear by reference to the deeds or conveyances executed by said company to these defendants respectively, and to which several deeds for greater certainty, these defendants pray leave to refer, and that each and every of these defendants is a *bona fide* purchaser *and* the State of Iowa, of the tract or tracts re-

spectively conveyed to him by said company, and that he has full, complete and indefeasible title thereto.

And these defendants deny that the said complainant is entitled to the relief claimed in his bill of complaint or any part or portion thereof, and aver and insist that by reason of the matters above and in the said answer of Wm. B. Wells, adopted and made a part thereof, contained the title of these defendants to the land in dispute claimed by them respectively, is perfect and absolute.

All which matters and things these defen-ants are ready to aver, maintain and prove as this honorable court shall direct, and they pray that their respective titles to the tracts claimed by them
95 respectively, may be confirmed and approved and declared valid, and that they be hence dismissed with their sosts herein most wrongfully sustained.

FINCH & RIVERS AND J. M. ELLWOOD,
Attorneys for Defendants Above Named.

And on the 13 day of May, A. D. 1870, there was filed in said cause, the following stipulation of parties:

United States Circuit Court, District of Iowa.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Albert H. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, and Others.

It is stipulated and agreed that the joint and several answers of the defendants, Albert H. Tracy, Francis Tracy, and Harriet Tracy, verified by Albert H. Tracy; the several answers of the defendant, Wm. B. Wells, sworn to by said Wells, and the joint and several answers of the defendants, Samuel G. Wolcott, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, John Stryker and The Des Moines Navigation and Railroad Company, sworn to by Electus B. Litchfield and Nathan J. Higbee, be deemed and taken as the answer of the several defendants herein, and that all previous answers of the said defendants verified by their solicitors and filed herein, be withdrawn from file.

To the several preceding answers the plaintiff filed a formal replication—putting in issue the several averments therein contained.

Stipulations Between the Parties.

In the Circuit Court of the United States.

IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES VALLEY RAILROAD COMPANY *et al.*

96–98 It is agreed that the only questions submitted on this hearing are:

1. In which of the parties is the paramount title to the lands in controversy?

2. If the title shall be adjudged to be in the defendant, The Des Moines Navigation and Railroad Company, is the plaintiff entitled to be reimbursed the taxes which it has paid on the lands?

The amount of taxes paid is admitted to be $2,000. If the court shall find that the plaintiff is entitled to be so reimbursed, the question of the amount to be reimbursed shall be referred to a master, and the defendant shall have the right to show any counter-claims or matters which should be considered as reducing the amount to be reimbursed.

It is admitted that D. W. Kilbourne was a director in the Des Moines Valley Railroad Company, from 1862 to 1867. It is admitted that the Dubuque & Sioux City railroad was completed to Sioux City, July 4th, 1870.

GRANT & SMITH, *Attorneys for Plaintiff.*
WITHROW & WRIGHT,
For D. M. N. & R. R. CO.
S. L. STRONG AND WITHROW & WRIGHT,
For D. M. V. R. R.
C. C. NOURSE,
For R. S. BURROWS.

* * * * * * *

99 The defendant then read the following portions of said record:

Notice Respecting Certain Lands in the State of Iowa.

Notice is hereby given that the lands along the Des Moines river, in Iowa, and within the within-claimed limits of the Des Moines grant in that State, above the mouth of the Raccoon fork of
100 said river, which have been reserved from sale heretofore on the account of the claim of the State thereto, will continue reserved, for the time being, from sale or from location, by any species of script or warrant, notwithstanding the recent decision of the Supreme Court against the claim.

This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers, holding under titles from the State, and to make such pro-

vision, by confirmation or adjustment, of the claims of such settlers as may appear to be right and proper.

JOS. S. WILSON,
Commissioner of the General Land Office.

General Land Office, May 18th, 1860.

Such notice was at once posted in a conspicious place in said land offices in Iowa, and so remained posted until the close of the year 1863.

On 25th May, 1860, Wm. T. Steiger, an agent in behalf of the Dubuque & Pacific Railroad Company, filed in the General Land Office a list of lands laying within the claimed limits of the Des Moines river grant above the Raccoon fork, and claimed to select some of them for said railroad company, under the act of 15th May, 1856, granting lands to Iowa for railroad purposes.

The Commissioner of the General Land Office, in June, 1860, acknowledged the receipt of the list, and added:

"The tracts in said list are above the Raccoon fork, and within the lands that had been selected under the Des Moines river grant, by act of 8th August, 1846, and in view of the recent decision of the Supreme Court affecting the title to lands under that grant above the fork, the present lists are presented by you. As the matter has been placed in train for congressional intervention, no action can be taken in the matter presented by you until Congress shall have had time to consider and dispose of the subject.

"Respectfully, your obedient servant,

"JOS. S. WILSON,
"*Commissioner.*"

On the 7th July, 1860, the Commissioner of the Land
101 Office, in an official letter to the Secretary of the Interior in relation to the same subject, said:

"Without passing upon, or, in fact, considering the question as to the right of the State under the railroad grant to these lands, which, at this date of the grant had been withdrawn from sale or location, the fact that Congress has taken incipient action in the matter, of itself justifies us in not recommending further proceedings by the department until after the close of the next session of Congress.

"Respectfully, your obedient servant,

"JOS. S. WILSON,
"*Commissioner.*"

On the 6th September, 1860, the Secretary of the Interior addressed the following letter to the Commissioner of the General Land Office:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Sept. 6th*, 1860.

SIR: In the absence of any direct application by the governor of the State of Iowa, for final action in the certification of certain lands common to the claimed limits of the grant to that State for the im-

provement of the Des Moines river and the grant for aid in constructing railroads; my opinion is that it will be proper, as you suggest, to delay action until after the close of the next session of Congress.

The papers enclosed with your letter of the 7th July last, and 3d instant, are now returned.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

The Commissioner of the General Land Office.

WASHINGTON, *June 1st*, 1860.

Hon. Joseph S. Wilson, Commis'r Gen'l Land Office.

SIR: Having been informed that the resolution introduced in the Senate by the Hon. Mr. Grimes, of Iowa, for confirming sales made by the State of certain lands on and near the Des Moines river and for other purposes, S. R. No. 37, has just been referred by
102 the Committee on Public Lands of the Senate to the Secretary of the Interior for his views, and is now before you for report—

I respectfully ask, in behalf of the railroad companies, that the enclosed printed copy of the decision of the Supreme Court referred to in the resolution, may be communicated to the committee; also that the companies may have the benefit of the facts, that the lands in question were by agreement, in adjusting the railroad grants at your office, placed in suspension, to await the decision of the courts, and that since the decision of the Supreme Court was rendered, they have been claimed and selected for the railroads, and particular lists and maps thereof filed by me as their agent, in the General Land Office.

I am very respectfully, your obedient servant,

WM. T. STEIGER, *Agent, &c.*

Notice Continuing Reservation of the Lands from Sale, May 18th, 1860.

Notice respecting certain lands in the State of Iowa.

Notice is hereby given that the lands along the Des Moines river, in Iowa, and within the claimed limits of the Des Moines grant in that State, above the mouth of the Raccoon forks of said river, which have been reserved from sale heretofore, on account of the claim of the State thereto, will continue reserved for the time being, from sale or from location, by any species of scrip or warrants, notwithstanding the recent decision of the Supreme Court against the claim.

This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers, holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers as may appear to be right and proper.

JOS. S. WILSON,
Commissioner of the General Land Office.

General Land Office, May 18, 1860.

Steiger, Agent, &c., to Commissioner Wilson, May 25th, 1860.

103 WASHINGTON, *May 25th*, 1860.

Hon. Joseph S. Wilson, Comm'r General Land Office.

SIR: Referring to the recent decision of the Supreme Court of the United States on the Des Moines river improvement claim, I herewith transmit a list, marked C, of my selections of this date for and on account of the Dubuque and Pacific railroad and branch, under the act of 15th May, 1856, of the interfering lands in the Fort Dodge district, Iowa, within the six and the fifteen mile limits of said railroad grant heretofore held in suspension in our adjustment.

This list discriminates the lands conditionally approved for the river grant, from those not yet approved in any list, and embraces as follows:

Whole quantity 6-mile limits	59,418.22	acres
15-miles "	73,729.35	"
Total	133,606.57	

Of which the quantity not yet approved all west of the river, is as follows:

Not approved 6-mile limits	15,456.47	acres
15-miles "	16,214.12	
Total	31,664.59	

I also enclose a connected diagram, marked D, showing by the pink and yellow shades thereon, the lands hereby selected.

Please acknowledge the receipt hereof.

Very respectfully, your ob'd't serv't,

WM. T. STEIGER, *Ag't, &c.*

Commissioner Wilson to Steiger, Ag't, &c., June 12, 1860.

GENERAL LAND OFFICE, *June 12th*, 1860.

W. T. Steiger, Esq., Washington, D. C.

SIR: I have to acknowledge the receipt of your letter of the 25th ult., enclosing lists and maps of lands selected and claimed under the railroad grant to Iowa, by act of May 15th, 1856, for the Dubuque and Pacific railroad.

104 The tracts in said lists are above the Raccoon fork, and within the lands that have been selected under the Des Moines river grant, by act of 1846, and in view of the recent decision of the Supreme Court, affecting a title to lands under the grant above the said fork, the present lists are handed in by you.

As the matter has been placed in train for congressional intervention, no action can be taken in the matter presented to you, until Congress shall have time to consider and dispose of the subject.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

Commissioner Wilson to Secretary Thompson, July 7th, 1860.

Hon. J. Thompson, Sec. of Interior.

SIR: I have the honor to return herewith the letter dated 26th ultimo, from W. T. Steiger, agent, &c., asking that certain lands selected and claimed under the railroad grant act to Iowa, of May 15th, 1856, may, without further delay, be certified to the State, and pursuant to reference, respectfully submit that the lands referred to are embraced in certain lists filed in this office, during the past month, in view of the recent decision of the Supreme Court, affecting a title to lands under the Des Moines river grant of 1846, above the Raccoon fork. The tracts in said lists are above the Raccoon fork and within the lands that have been selected under the above-mentioned river grant.

Upon the receipt of these lists, Mr. Steiger was advised that, as the matter had been placed in train for congressional intervention, no action could be taken by this office, until Congress should have had time to consider and dispose of the subject.

Without passing upon, or in fact considering the question as to the right of the State under the railroad grant, to these lands, which, at the date of that grant, had been withdrawn from sale or location, the fact that Congress had taken incipient action in the mat-
105 ter, of itself, justifies us in not recommending further proceedings by the department, until after the close of the next session of Congress.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

Secretary Thompson to Senator Jones, Nov. 3d, 1860.

Extract from a letter dated—

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Nov. 3d*, 1860.

SIR: I have the honor to acknowledge the receipt of your letter of this date, and have considered the same in connection with the letter of Mr. Steiger, agent of the Dubuque & Sioux City Railroad Company, of the 1st instant, both relating *the* to the certification to the State of Iowa, of lists of odd-numbered sections of land within the six and fifteen mile limits of the railroad "from the city of Dubuque to a point in the Missouri river near to Sioux City."

For your information I herewith enclose copies of my letters of the 6th of September last, to the Commissioner of the General Land Office, and of the 1st of October to Mr. Steiger, and in reply to your letter would state that, as respects those tracts within the limits of the railroad grant which have already been certified to the State of Iowa, by my predecessor, under the previous grant of August 8, 1846, in the absence of a formal and sufficient surrender by the State of all claims under the prior grant I deem it proper to suspend action

at present so far as the claims interfere. The subject of these opposing claims is involved with proposed legislation pending in Congress; and the State authorities still assert the equity of the title which has been recognized by my predecessors, though since declared to be invalid by a decision of the Supreme Court of the United States.

* * * * * * *

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

Hon. Geo. W. Jones, of Iowa, present.

106 *Secretary Thompson to Governor Kirkwood, Nov. 3d, 1860.*

Extract from a letter dated—

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *November 3d*, 1860.

His excellency S. J. Kirkwood, governor, &c., Des Moines, Iowa:

* * * * * * *

Again I would remark, that, so far as any proposition for congressional aid in behalf — the State, was brought to the notice of this department during the last session of Congress, it was confined, as I understood it, to that portion of the claimed lands which have been heretofore certified by my predecessors, and which has not been included in the lists of lands ordered into market. In respect to this class of lands, I had the honor, in a communication of the 11th of June, last, addressed to Hon. R. W. Johnson, chairman of the Committee — Public Lands of the United States Senate, to recommend the report to that body, for adoption by Congress, the form of a joint resolution, as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all the title which the United States still retain in the tracts of land along the Des Moines river, and above the Raccoon forks, thereof, in the State of Iowa, which has been heretofore certified to said State improperly by the Department of the Interior as part of the grant by act of Congress approved August 8th, 1846, be, and the same is hereby relinquished to the State of Iowa."

You thus perceive that, so far as my predecessors have acted under the grant of August 8th, 1846, I was willing to recommend a confirmation of that action by Congress. I cannot, however, go further.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

Joint Resolution to Quiet Title to Lands in the State of Iowa, Approved March 2d, 1861. (12 *Stat. at Large, p.* 251.)

107–140 Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all the title which the United States still retain in

the tracts of land along the Des Moines river, and above the mouth of the Raccoon forks thereof, in the State of Iowa, which have been certified to said State improperly, by the Department of the Interior, as a part of the grant by act of Congress, approved August 8th, 1846, and which is now held by *bona fide* purchasers under the State of Iowa, be, and the same is hereby relinquished to the State of Iowa.

Approved March 2nd, 1861.

* * * * * * *

141 In the Supreme Court of the United States.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

To prevent unnecessary incumbrance of the record in this cause it is stipulated that the evidence in the court below established the following facts:

That on the 7th day of April, 1863, there was certified to the State to aid in the construction of the Dubuque & Pacific railroad, lands as follows:

56,573.32 acres.	
21,061.91 "	
1,382.32 "	
	78,917.25
And the 13th December, 1864	159.60

That the land certified on the 27th day of December, 1858, embraced none of the lands in dispute in this controversy, and no lands lying in odd-numbered sections within five miles of the Des Moines river.

That the lists made on the 7th of April, 1863, and the 13th of December, 1864, embraced the lands in dispute, except indemnity lands, and all were in odd-numbered sections within five miles of the Des Moines river. * * *

(Signed) WITHROW & WRIGHT,
For the Des Moines Navigation and Railroad Company, and the Des Moines Valley Railroad Company.
GRANT & SMITH, *For Plaintiff.*

142–154 And afterwards, to wit, on the 31 day of May, 1871, the following decree was rendered in said cause by circuit court:

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

The cause came on to be heard at the May term, 1871, of said court, Grant & Smith, for the plaintiff, and Ellwood, Nourse & Withrow, for the Des Moines Navigation and Railroad Company and purchaser, and Withrow & Strong, for the Des Moines Valley

Railroad Company. And the cause is heard upon the bill and amendments, answers, replications, agreements of counsel, exhibits and depositions.

And thereupon, it was ordered, adjudged and decreed that the plaintiff's bill as to the lands in townships 86, 87 and 88, ranges 27 28, 29 and 30, east and west of the Des Moines river and south of the second correction line, and townships 89, 90, 91 and 92, ranges 28 and 29, east of the Des Moines river, and the bill for the relief for indemnity lands in lieu thereof, be dismissed.

And the bill for relief as to the lands in townships 89 and 90, north range 28 and 29, west, on the west side of Des Moines river, be dismissed without prejudice, and that the plaintiffs pay the cost.

The defendant then read in evidence, the decree of the Supreme Court of the United States, rendered in the case of the Iowa Homestead Company, reported in 17 Wallace, page 153, as follows:

"This cause came on to be heard on the transcript of the record from the circuit court of the United States, for the district of Iowa, and was argued by counsel. On consideration whereof, it is now here adjudged and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby affirmed with costs."

* * * * * * *

155 The foregoing is all the evidence given or offered by either of the parties on the trial of said cause, and thereupon this cause was submitted to the court on the 12th day of March, 1884, and by agreement was taken under advisement, the decree to be rendered in vocation as of this term, and afterwards, and on the 14th day of July the court rendered the following

Decree.

This cause coming on for final hearing on the 4th day of March, A. D. 1884, George Crane appearing for the plaintiff, and Theo. Hawley appearing for the defendants, was duly submitted to the court on the issues and the evidence, and full argument of the respective counsel, and the court desiring to take the cause under advisement it was ordered with the consent of the parties to the suit that the decision of the court be rendered in vacation, and that the decree of the court be entered as of the 4th day of March, 1884.

And the court having duly considered the issues, the evidence and the arguments of counsel finds the issues in favor of the plaintiff, and further finds that said plaintiff is entitled to recover the sum of money paid by the plaintiff's assignor and interest thereon from the time said several payments were made; the court also finds and decides that the plaintiff is entitled to a lien on the real estate on which said taxes were paid.

It is therefore ordered, adjudged and decreed that said Edward K. Goodnow, plaintiff, have and recover of and from said Woolsey Welles, A. K. Welles and Wm. B. Welles, Jr., as trustees the sum of

$7,308.94, and interest thereon from March 4th 1884, at six per cent. per annum, and costs of suit taxed $——, and that the said claim or decree is hereby made a special lien on the lands mentioned in the petition and described as follows:

(Here the clerk will set out the lands described in the petition)

from the 28th day of April, 1873, that plaintiff have special
156 execution, and that said real estate be sold according to law, to all of which the defendants duly excepted.

H. C. HENDERSON, *Judge.*

And on the 20th day of March, 1884, the court duly certified that the foregoing was all the evidence offered on the trial of said cause, and on the 5 day of September the defendants perfected their appeal from said judgment to the supreme court of Iowa, by serving a notice of said appeal upon plaintiff's attorneys and the clerk of said district court.

Assignment of Errors.

1. The court erred in rendering judgment for plaintiff.
2. The court erred in allowing interest on the taxes paid prior to the commencement of this action.
3. The court erred in holding that the decree rendered in the homestead company's case was not a bar to plaintiff's right of recovery.
4. The court erred in allowing plaintiff to recover for taxes paid on the lands conveyed by Wm. B. Welles to E. C. Litchfield.
5. The court erred in making the judgment rendered a lien upon said lands.
6. The court erred in holding that plaintiff was bound by the statute of limitations.
7. The court erred in not rendering judgment for defendants, and dismissing plaintiff's petition.
8. The court erred in disallowing pl'ff's motion for change of venue.

THEO. HAWLEY,
Defendants' Attorney.

157 And at the March term, 1885, of said supreme court the cause was duly submitted on the foregoing record, and after due consideration the court filed its decision in writing on the 17th day of May, 1888, the same being in words and figures following, to wit:

158 "MAY 17, 1888.

E. K. GOODNOW
vs.
WOLSEY WELLS *et al.*, Appellants. } Appeal from Webster District Court.

Action in equity to recover taxes paid under the same circumstances substantially as stated in Goodnow *vs.* Moulton, 51 Iowa, 555. There was judgment for the plaintiff and the defendants appeal.

Theo. Hawley, for appellants; George Crane, for appellee.

By the COURT: The facts in this case are the same as in Goodnow *vs.* Stryker, 61 Iowa, 261, and following that case the judgment of the district court must be affirmed. There are members of the court who think the cited case was incorrectly decided, but under the well-settled rule of *stare decisis* they think we must adhere thereto, especially so because of the many peculiar facts and many cases which have been determined by the court based on the subject-matter upon which this action is grounded.

Affirmed."

The opinion in Goodnow *vs.* Stryker, referred to in the foregoing decision, is in words and figures following, to wit:

159 "TUESDAY, *June* 12.

GOODNOW *vs.* STRYKER. } Appeal from Webster Circuit Court.

Action to recover for certain taxes paid to Webster county on certain land in that county belonging to the defendant, John Stryker. The taxes were paid by the Iowa Homestead Company, which supposed itself to be the owner of the land, and they were paid under such circumstances as to raise an implied promise on the part of the defendant to reimburse the homestead company. This fact was established by an adjudication in this case. See Goodnow *v.* Stryker, 54 Iowa, 326, where this case is reported upon a former repeal. The plaintiff became entitled by assignment to all rights of the homestead company. After the case was remanded upon the former appeal two additional defenses were set up, one or both of which must have been held sufficient. The court dismissed the plaintiff's petition, and he again appeals.

George Crane, for appellant; Theodore Hawley and C. H. Gatch, for appellee.

ADAMS, *J.*:

I. The defendant pleaded as one of its additional defenses that the plaintiff's right of recovery is barred by a prior adjudication, to wit, an adjudication in the case of The Iowa Homestead Company *vs.* The Des Moines Navigation & Railroad Company, John Stryker, *et al.*, reported in 17 Wallace, 153. To this plea the plaintiff replies, in substance, that if it should be conceded that the court made an adjudication in that case denying a right of recovery for the taxes in question in this case, yet this action is not barred, because a right of recovery has arisen since that time. The fact relied
160 upon as giving such right of recovery is that the defendant now claims, as he did not then, the benefits of the payments made by the homestead company. After this action was instituted a petition was filed in the case by Webster county, averring, among other things, that the taxes in question have never been paid by any one, and that the same are now due to the county from the defendant. To this petition the defendant answered, averring "that all of said taxes mentioned in said petition were duly paid by the

Iowa Homestead Company, * * * and said defendant is no longer liable therefor." The question presented is as to whether, if the payments in the first instance were officious, as we may assume was held, and the defendant for that reason was not liable, the subsequent adoption of the payments for the purpose of escaping liability to the county should be regarded as an adoption of the payment as between the defendant and plaintiff. If the plaintiff's assignor had made the payments in the name of the defendant as his assumed agent, any act of the defendant indicating an intention to claim the benefit of the payments would constitute a ratification of the acts by which the payments were made. But the defendant contends that the case is different where a person pays another person's debt, not under a claim of acting for such person, but under the mistaken supposition that the debt is due from himself. The defendant's position is that in such case there is no act of assumed agency to ratify. It must be conceded, we think, that in one sense this is so. The plaintiff's assignor did not hold himself out as the defendant's agent.

Nevertheless, when the defendant claims the benefit of the
161 payments he elects to treat the acts of payment as done for himself. Having elected to so treat the acts, he ought not to complain if the court treats them in the same way. Natural justice certainly requires that, if the defendant has the benefit of payments as discharging his liability to the county, he should reimburse the plaintiff, whose assignor made the payments. If we were to take any other view, it appears to us that we should attach more importance to the form than the substance of things. We do not overlook the fact that, under ordinary circumstances, every tax-payer has the right, as between himself and third persons, to pay his own taxes in his own way and to pay them to the county to which they are due and not be compelled to run after a self-substituted creditor and make payments to him. Where, therefore, such payment is made by a third person, the tax-payer, under ordinary circumstances, has a right to ignore the payment if he chooses to do so. But if he chooses not to ignore but to claim the benefit of it, we see no reason why we may not regard him as treating the act of payment as done for him, and if we so regard him there is no difficulty in finding an implied promise to reimburse the payer or his assignee. We ought, perhaps, to say in this connection that the doctrine has been announced that there can be no ratification of an act not done avowedly for the principal. Story on Agency, section 251; Fellows *v.* Commissioners, 36 Barb., 655. But the case before us is peculiar. The act done was such that it *is* necessarily inured to the defendant's sole benefit. Besides, the circumstances under

which the act was done should not be overlooked. The de-
162 fendant neglected the payment of the taxes, which was a duty of public concern. He allowed the plaintiff's assignor, under an honest claim of title to the land, to discharge this duty for several years in succession. Now, while the plaintiff is not allowed by reason of the prior adjudication to set up these facts as alone sufficient to create a liability on the part of the defendant, they may be considered, we think, in connection with the fact that the

defendant has since claimed the benefit of the payments as sufficient to render such claim of benefit a ratification if it otherwise would not be.

II. We come next to consider the second additional defense, and that is that the claim is barred by the statute of limitations. In considering this question we have no occasion to inquire when the payments were made. If the defendant's liability arose by reason of his adoption of the payments, as we hold, and that was done by his pleading in this case, the action is not barred.

Whether the action was premature is a different question and one not raised. We will merely say that if at the time the defendant adopted the payments he had tendered to the plaintiff the money necessary to discharge his liability it would seem reasonable that he should not be held liable for the costs theretofore accrued; but whether he could, while denying his liability, be heard, under the circumstances, to say that the action was premature is, to say the least, doubtful. We have considered the two additional defenses set up by the defendant, to wit, prior adjudication and the statute of limitations, and, having reached the conclusion that they are not tenable, we have to say that the judgment must be—

Reversed."

163 *Final Judgment.*

Be it remembered that on the 17th day of May, 1888, the following proceedings were had in the supreme court of Iowa, to wit:

"E. K. GOODNOW
vs.
WOOLSEY WELLES *et al.*, Appellant. } Appeal from Webster Dist. Court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that *procedendo* issue accordingly.

It is further considered by the court that the appellants pay the costs of this appeal, taxed at $16.75, and that execution issue therefor."

164 On the 14th day of June, 1888, the appellants filed in said supreme court a petition for rehearing, and the same was, on the 17th day of Oct., 1889, overruled, but the- was no further or supplemental opinion.

While said cause was pending in said supreme court the death of Edward K. Goodnow was suggested and George Crane, adm'r, was duly substituted as party appellee.

Afterwards there were filed in said supreme court a certificate for writ of error, writ, bond, and citation, and the same are hereto attached in original form as a part of the return to said writ, and true and correct copies of the originals have been made and the same are lodged in the office of the clerk of said court.

165 In the Supreme Court of Iowa.

EDWARD K. GOODNOW, Plaintiff,
vs.
WOOLSEY WELLES *et al.*, Defendants.

And now, on the application of said defendants, it is certified by the court here and ordered to be made part of the record herein that, by the answer of the defendants in their assignment of errors and on the hearing in said cause, defendants claimed immunity from the entire demand and claim of plaintiffs on the ground that, as they claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Iowa Homestead Company, by the Supreme Court of the United States in the case of the Iowa Homestead Company against the Des Moines Navigation & Railroad Company, William B. Welles, Sr., the grantor of these defendants, and others, at the October term thereof, A. D. 1872, and that our decision herein was and is against the immunity so claimed by defendants.

It is further certified and ordered to be made part of the record herein that the facts in this case, instead of being the same as in the case of Goodnow *vs.* Stryker, 61 Iowa, 261, as erroneously stated in the opinion in this case, filed May 17, 1887, differ from the facts in the Stryker case in this: that while the answer of the defendants in each of the cases contained the following paragraph:

"Said defendants, further answering, say that all of said taxes mentioned in said petition were duly paid by said Iowa Homestead Company as soon as the same became due, and said defendants are no longer liable therefor"—

There was not in the Stryker case any motion or request of any kind for leave to withdraw the same, or any showing or claim that it had been filed by mistake or without authority.

Dated at Des Moines, Iowa, this 17 day of Oct., A. D. 1889.

JOSIAH GIVEN,
Chief Justice.

[Endorsed:] In the supreme court of Iowa. 11231. Edward K. Goodnow *vs.* Woolsey Wells *et al.* Certificate on appeal to U. S. S. C. Filed Oct. 17, 1889. G. B. Pray, clerk sup. court. Gatch, Connor & Weaver, for defendants.

166 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court, before you, between George Crane, administrator of the estate of Edward K. Goodnow, and Woolsey Welles, A. K. Welles, and Wm. B. Welles, Jr., trustees, wherein was drawn in question the validity of the authority exercised under the State of Iowa on the ground of its being repugnant to the laws of the United States and the decision was in favor of the validity of such authority, and wherein certain

rights, privileges, and immunities were claimed under a certain judgment of the Supreme Court of the United States and authority exercised under the United States and the decision was against the rights, privileges, and immunities so claimed, a manifest error hath happened, to the great damage of the said Woolsey Welles, A. K. Welles, and Wm. B. Welles, Jr., trustees, as by their complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held,

167 that, the record and proceedings aforesaid being inspected, *of* the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 13th day of December, A. D. 1889.

[Seal U. S. Circuit Court, Southern District Iowa.]

E. R. MASON,
Clerk U. S. Circuit Court, S. Dist. of Ia.

Approved December 13th, 1889.

JOSIAH GIVEN,
Chief Justice of the Supreme Court of Iowa.

[Endorsed:] 11231. Writ. Filed Dec. 13, 1889. G. B. Pray, clerk sup. court.

168 Know all men by these presents that we, Woolsey Welles, A. K. Welles, and Wm. B. Welles, Jr., trustees, and G. S. Ringland, are held and firmly bound unto George Crane, administrator of the estate of E. K. Goodnow, deceased, in the full and just sum of one thousand dollars, well and truly to be paid to the said George Crane, administrator, or his successors; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Signed and dated this 12 day of December, 1889.

Whereas lately, at a term of the supreme court of Iowa, in the suit depending in said court between George Crane, administrator of the estate of E. K. Goodnow, deceased, and Woolsey Welles, A. K. Welles, and Wm. B. Welles, Jr., trustees, judgment was rendered against the said Woolsay Welles, A. K. Welles, and Wm. B. Welles, Jr., trustees, and the said Woolsay Welles, A. K. Welles, and Wm. B. Welles, Jr., trustees, having obtained writ of error and filed a copy thereof in the clerk's office of said court to remove the judgment in the aforesaid suit, and a citation directed to the said George Crane, administrator, *de*monishing him to be and appear at a

Supreme Court of the United States to be holden at Washington, D. C., the second Monday of October next:

Now, the condition of the above obligation is such that if the said Woolsey Welles, A. K. Welles, and Wm. B. Welles, trustees, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their said plea, then the above obligation to be void; otherwise in full force and virtue.

WOOLSEY WELLES,
A. K. WELLES, AND
WM. B. WELLES, JR.,
Trustees of Estate of Wm. B. Welles, Deceased,
By GATCH, CONNOR & WEAVER,
Their Attorneys.

G. S. RINGLAND.

STATE OF IOWA, }
County of Webster, } *ss:*

I, D. J. Haire, clerk of the district court of the county and State aforesaid, do hereby certify that I consider the surety, G. S. Ringland, whose name is subscribed to the foregoing bond, is good and sufficient for the sum therein named, and I, as said clerk, would accept and approve the same if presented to me in this county for the purposes therein set forth.

Witness my hand and seal of the district court this 12th day of Dec'r, 1889.

[Seal of the District Court, Webster County, Iowa.]

D. J. HAIRE,
Clerk District Court.

169 The within bond is hereby approved this 13th day of December, 1889.

JOSIAH GIVEN,
Chief Justice, Supreme Court of Iowa.

[Endorsed:] 11231. Goodnow *v.* Welles. Bond. Filed Dec. 13, 1889. G. B. Pray, clerk sup. court.

170 The United States of America to George Crane, administrator of the estate of E. K. Goodnow, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Woolsey Welles, A. K. Welles, and Wm. B. Wells, Jr., trustees, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Josiah Given, chief justice of the supreme court

of the State of Iowa, this 27th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

JOSIAH GIVEN,
Chief Justice, Supreme Court of Iowa.

Service of the within citation and receipt of copy of same acknowledged this 28th day of December, 1889.

GEORGE CRANE,
Att'y for Geo. Crane, Adm'r, Defendant in Error.

[Endorsed:] 11231. Goodnow *vs.* Wells. Citation.

171 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a full, true, and correct transcript of the record and decision of a cause tried and determined in the said supreme court between Edward K. Goodnow, pl'ff and appellee, and Woolsey Welles & others, def'ts and appellants, to wit, a transcript of the abstract of record, decision, and final judgment.

And I further certify that a certificate for writ of error, writ, bond, and citation are attached in original form to the foregoing transcript and are made a part of the return to said writ, and that true and correct copies thereof have been retained by me and remain on file in my office, and this return is made in obedience to said writ.

In testimony whereof witness my signature and official seal, at Des Moines, Iowa, this 24th day of July, 1890.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY,
Clerk Supreme Court, Iowa.

172 In the Supreme Court of the United States, October Term, A. D. 1890.

WOOLSEY WELLES, A. K. WELLES, and WILLIAM B. WELLES, Trustees, Plaintiffs in Error,
vs.
GEORGE CRANE, Administrator of E. K. Goodnow, Defendant in Error.

Come now the plaintiffs in error, Woolsey Welles, A. K. Welles, and William B. Welles, trustees, and, under rule X of this court, state—

First. That they intend to rely for the reversal of the judgment of the supreme court of the State of Iowa in the above-entitled case on the error, as they claim, of said court in holding that the defense of former adjudication set out in the amended answer filed by them in the circuit court of Webster county, Iowa, on the third day of June, 1881, being the adjudication by this court in the suit of The Iowa Homestead Company *vs.* The Des Moines Navigation & Railroad Company, William B. Welles, and others, at the December term

thereof, 1872, was not a good defense, and in not holding that said adjudication was a good defense and a bar to this suit.

Second. And they further state that the following are the parts of the record and all thereof that they deem necessary for consideration in the determination of said alleged error, to wit: From the beginning on page 1—according to the original printed
173 paging as shown on the printed portion of the transcript and which paging for the present purpose is used throughout this statement—to and including "James McKinley, secretary," on p. 5.

Beginning near bottom of page 7 with the words "And afterwards, on the 5th day of April, 1879," to and including "Theo. Hawley, defendants' attorney," on p. 8.

Beginning with the words "And on the same day plaintiff filed his reply," on p. 9, to and including "Geo. Crane and John Doud, Jr., attorneys for plaintiff," on same page.

Beginning again on same page, near bottom, with the words "And afterwards, to wit, on the 3rd day of June, 1881," and ending with the words "in full force and effect," at the end of the first paragraph on p. 10, adding thereto "Theo. Hawley, defendants' attorney."

The following portion of the reply of defendant in error, on p. 11: "And afterwards, on the 20th day of December, 1881, there was filed the reply of plaintiff, as follows: Said plaintiff denies each and every allegation in said answer contained and asks judgment as heretofore prayed. (Signed) Geo. Crane, attorney for plaintiff."

Beginning again on p. 14 with the words, near the top of the page, "And afterwards, on the 5th day of March, 1884," and ending with the words, on p. 16, "Theo. Hawley, notary public."

Beginning again on p. 22 with the words, near top of page, "And afterwards, on the same day, the plaintiff offered in evidence," to and including the words "Plaintiff rests," on p. 24.

Beginning on p. 25, near the bottom of the page, "Defendants offered in evidence certified copy," and ending with the words,
174 near bottom of page 26, "Mr. Crane. I have no objection to that."

Beginning again on p. 28, near top of the page, with the words "Defendants offered in evidence the decree," and ending with the words, near bottom of same page, "28th April, 1873."

Beginning again on p. 45, at top of page, with the words "The plaintiff," and ending on p. 93 with "D. O. Finch, of counsel."

Beginning again on p. 95, near bottom of the page, with "Stipulations between the parties," and ending on p. 96 with "C. C. Nourse, for R. S. Burrows."

Beginning again on p. 99, near bottom, with the words "The defendants then read," and ending on p. 107, near top of page, with the words "Approved. March 2nd, 1861."

Beginning again on p. 141 with the words, near the top of page, "In the Supreme Court of the United States," and ending with the words "and the same is hereby affirmed with costs," near bottom of p. 142.

All of pp. 155 and 156.

The record entry in the supreme court of the State showing submission, the opinion of the court, the final judgment, and the certificate.

Nov. 20, 1890.

C. H. GATCH AND
WM. CONNOR,
Attorneys for Plaintiffs in Error.

I hereby acknowledge service of above by copy this 21st day of November, 1890.

GEORGE CRANE,
Attorney for Defendant in Error.

175 [Endorsed:] 14120. Supreme Court U. S. 1893, October term. No. 160. Woolsey Welles *et al.*, pl'ffs in error, *vs.* George Crane, adm'r, &c. Statement of errors & designation by pl'ffs in error of parts of record to be printed & acknowledgment of service.

[Stamped:] Office Supreme Court U. S. Filed Nov. 28, 1890. James H. McKenney, clerk.

176 DUBUQUE, IOWA, *Nov.* 25, 1890.

Hon. James H. McKenney, clerk Sup. Court U. S.

DEAR SIR: In addition to what the plaintiff in error in the case of Welles *vs.* Crane, No. 1255, has designated to be printed on the record, please print the following:

1st. All on pages from 1 to 11 of the printed abstract contained in the transcript down to the words "George Crane, attorney for plaintiff," where they first occur on said page 11.

2d. Also all on pages 93, 94, & 95 of said abstract.

3d. Also decisions on pages 158–162 of the transcript and the judgment on page 163.

Very respectfully yours, &c., GEORGE CRANE.

177 [Endorsed:] Supreme Court U. S. 1893, October term. No. 160. Woolsey Welles *et al.*, pl'ffs in error, *vs.* George Crane, adm'r, &c. Designation by defendant in error of additional parts of record necessary to be printed.

[Stamped:] Office Supreme Court U. S. Filed Nov. 29, 1890. James H. McKenney, clerk.

Endorsed on cover: Case No. 14,120. Iowa supreme court. No. 160. Woolsey Welles, A. K. Welles, and William B. Welles, Jr., trustees, plaintiffs in error, *vs.* George Crane, administrator of the estate of Edward K. Goodnow, deceased. Filed, August 30, 1890.

Office Supreme Court U. S.
FILED.
SEP 16 1893
JAMES. H. McKENNEY.
CLERK.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

NO 183.

WOOLSEY WELLES, ET AL, *Plaintiffs in Error*,

vs.

GEORGE CRANE, ADMINISTRATOR OF EDWARD K. GOODNOW, *Defendant in Error.*

} On Error From Supreme Court of Iowa.

C. H. GATCH, for Plaintiff in Error.

GEORGE CRANE, for Defendant in Error.

DEFENDANT'S BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

Office Supreme Court U. S.
FILED.
SEP 16 1893
JAMES. H. McKENNEY.
CLERK.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

NO 160.

WOOLSEY WELLES, ET AL, *Plaintiffs in Error,*

vs.

GEORGE CRANE, ADMINISTRATOR, OF EDWARD K. GOODNOW, *Defendant in Error.*

ON ERROR FROM SUPREME COURT OF IOWA.

C. H. GATCH, for Plaintiff in Error.

GEORGE CRANE, for Defendant in Error.

DEFENDANT'S BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

NO 160.

WOOLSEY WELLES, ET AL, *Plaintiffs in Error*,

vs.

GEORGE CRANE, ADMINISTRATOR, OF EDWARD K. GOODNOW, *Defendant in Error.*

ON ERROR FROM SUPREME COURT OF IOWA.

C. H. GATCH, for Plaintiff in Error.

GEORGE CRANE, for Defendant in Error.

DEFENDANT'S BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

This is a motion to dismiss the writ of error issued to the Supreme Court of Iowa. The facts in the record are absolutely identical with the facts in the case of *Chapman vs. Goodnow, Administrator, 123 U. S. 540.*

With the necessary changes in names, dates and amounts the record in this case is an actual copy of the record in the case cited above.

The second point made to sustain the writ of error cannot be raised on the record. It is claimed that a motion was made to the Court for leave to withdraw a certain section of the answer. It is true that such a motion was filed, but the record shows that the Court never acted upon it. Hence there is nothing for this Court to adjudicate.

This point, even if properly presented, would not involve to any extent a federal question, wherefore defendant asks for the dismissal of said suit.

GEORGE CRANE,
Attorney for Defendant in Error.

Office Supreme Court U. S.
FILED.
OCT 5 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

WOOLSEY WELLES, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE CRANE, ADMINISTRATOR OF THE ESTATE OF EDWARD K. GOODNOW, DEFENDANT IN ERROR.

No. 160.

C. H. GATCH AND WILLIAM CONNOR, *Attorneys for Plaintiffs in Error.*

GEORGE CRANE, *Attorney for Defendant in Error.*

BRIEF FOR PLAINTIFFS IN ERROR IN RESISTANCE OF MOTION TO DISMISS.

P. C. KENYON, LAW BRIEF PUBLISHER, DES MOINES.

The second point made to sustain the writ of error cannot be raised on the record. It is claimed that a motion was made to the Court for leave to withdraw a certain section of the answer. It is true that such a motion was filed, but the record shows that the Court never acted upon it. Hence there is nothing for this Court to adjudicate.

This point, even if properly presented, would not involve to any extent a federal question, wherefore defendant asks for the dismissal of said suit.

GEORGE CRANE,
Attorney for Defendant in Error.

Office Supreme Court U. S.
FILED.
OCT 5 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

WOOLSEY WELLES, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE CRANE, ADMINISTRATOR OF THE ESTATE OF EDWARD K. GOODNOW, DEFENDANT IN ERROR.

No. 160.

C. H. GATCH AND WILLIAM CONNOR, *Attorneys for Plaintiffs in Error.*

GEORGE CRANE, *Attorney for Defendant in Error.*

BRIEF FOR PLAINTIFFS IN ERROR IN RESISTANCE OF MOTION TO DISMISS.

P. C. KENYON, LAW BRIEF PUBLISHER, DES MOINES.

P. C. KENYON, LAW BRIEF PUBLISHER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

WOOLSEY WELLES, ET AL,
Plaintiffs in Error,

vs.

GEORGE CRANE, ADMINISTRATOR OF THE ESTATE OF EDWARD K. GOODNOW, *Defendant in Error.*

No. 160.

C. H. GATCH AND WILLIAM CONNOR, *Attorneys for Plaintiffs in Error.*

GEORGE CRANE, *Attorney for Defendant in Error.*

BRIEF FOR PLAINTIFFS IN ERROR IN RESISTANCE OF MOTION TO DISMISS.

It is not true, as stated in defendant's brief in support of the motion to dismiss, that the facts in the record in this case "are absolutely identical with the facts in the case of *Chapman* "*vs. Goodnow, Admr.*, 123 U. S., 540;" nor is it true that they are substantially the same. But if they were, it would be immaterial, since there is nothing in this record showing either what the facts were in that, or, as we will presently show, upon

what question or questions the supreme court of Iowa decided that case. In the only report made of the case (64 Iowa, 602–3) it is said: "The facts of the case and questions of law involved "are the same as those in *Goodnow vs. Litchfield*, 63 Iowa, "275; *Iowa Homestead Co. vs. Des Moines Navigation &* "*Railroad Co.*, Id., 285; *Goodnow vs. Stryker*, 62 Id., "221." Some of the questions of law involved in the cases named will be referred to hereafter.

The only questions in this case are, first, whether or not the supreme court of Iowa decided the federal question presented by the pleadings, and if not, second, whether or not its decision was, in the language of this court in the opinion in *Chapman vs. Goodnow*, *supra*, "rendered unnecessary by the view which "the court *properly* took of the rest of the case, *within the* "*scope of the pleadings.*"

The suit was originally commenced in the circuit court of the state of Iowa, in and for Webster county, by Edward K. Goodnow against William B. Welles for the recovery of money that had long previously been paid by the assignor of Goodnow, the Iowa Homestead Company, as and for the taxes on certain lands described in the petition, being part of the lands belonging to what is known as the Des Moines River Land Grant, this being only one of a large number of suits prosecuted by the same plaintiff for different portions of the whole amount paid by said Homestead Company on the same account, but on different parcels of land. Webster county, in which the lands were located, having also been made a party, filed a pleading in which it alleged that the defendant Welles had never paid the taxes and asked judgment against him therefor and to have the same declared a lien upon the premises. After the commencement of the suit, said Welles having deceased, the present plaintiffs in error, as his trustees, were substituted as defendants, and on the same day their attorney prepared and filed for them the answer that is the real ground

of contention in the case. Still, subsequently, the venue was changed from the circuit court to the district court of the same county, and from the decision of the last named court in favor of Goodnow, the defendants Welles, trustees, appealed to the supreme court of Iowa, and from the decision of that court, affirming the judgment of the district court, the case was brought on error to this court.

The only defense relied upon here is the defense of a former adjudication had in the case of the *Iowa Homestead Co. vs. Des Moines Navigation & Railroad Co., William B. Welles, et al*, reported 17, Wallace 167, in which the right of recovery as to the same taxes was decided adversely to the Homestead Company and in favor of Welles. The pleadings, and the judgment of this court in that case, are set out in the record. The only ground upon which the defense of former adjudication is contested is that of an alleged new promise made by plaintiff in error in their answer before referred to, to the pleading filed by Webster county, in which they say :

> All taxes mentioned in said petition were duly paid and satisfied to said county, by the said Iowa Homestead Company as soon as the same became due and said defendant is no longer liable therefor.

No subsequent pleading was filed either by Webster county or Goodnow, alleging or in any way claiming the benefit of this answer as a new promise, or making any issue whatever with respect to it, or admitting of the introduction of evidence, either in proof or disproof of the same.

We claim in the first place that it does not appear from the record that the judgement of the supreme court of Iowa was rendered upon a non-federal question ; and in the next place that if it does so appear, it further sufficiently appears that the non-federal question was "used to give color only to a refusal to "allow the bar of the decree."

First. It does not appear from the opinion of the lower court, or otherwise from the record, unless it be from the cer-

tificate of the chief justice certifying the federal question involved, upon what question or questions the case was decided, and it certainly does not appear that there was any non-federal question in the case upon which *it should have been decided.* The following is the opinion, if such it may be called, in full :

> The facts in the case are the same as in *Goodnow vs. Stryker*, 61 Iowa, 261, and following that judgment, the judgment of the district court must be affirmed. There are members of the court who think the cited case was incorrectly decided, but under the well settled rule of *stare decisis* they think we must adhere thereto, especially so because of the many peculiar facts and many cases that have been determined by the court based on the subject matter upon which this action is grounded.

This, we submit, is not enough to warrant this court in finding that the supreme court of Iowa rested its judgment upon a manifestly erroneous view of a question of local law rather than upon the federal question distinctly presented by the pleadings, and upon which very manifestly it *should have been* decided.

In *Klingler vs. State of Missouri*, 13 Wall., 257, this court on page 263 say :

> But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground upon which it might have been based was a *good and valid one*, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case : but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction.

In Curtis on Jurisdiction of United States Courts, 42, referring to *Neilson vs. Lagow*, 12 How., 98, and *McGuire vs. Tyler*, 8 Wall., 642, it is said :

> These cases to which I have just referred settle that, if it does not appear on the record that the state court did in truth decide on that question of local law, the supreme court will presume that they did not decide upon that question, provided the decision would be wrong in the judgment of the supreme court.

And we insist that if to find that the lower court based its decision upon the non-federal question would be to impute to it a manifestly erroneous decision, it should be made *clearly* to appear that its decision was based upon such non-federal question.

There were a number of questions, both federal and non-federal, in *Goodnow vs. Litchfield*, other than the one discussed in the opinion, and the court might possibly have followed the judgment in that case for the reason stated in the previous case of *Goodnow vs. Moulton*, 51 Iowa, 455; that in *Homestead Co. vs. Valley Railroad Co.*, "The matter of taxes was only so "far involved as the same in a court of equity would affect or "bear upon the question of title;" thus in effect holding that there was no such adjudication as was claimed in both the Moulton and the Litchfield cases.

In what uncertainty the real ground of decision is left by a loose statement such as was made by the court in the Litchfield case, is even better illustrated by its opinion, or statement, in *Goodnow vs. Chapman*, which counsel for defendants say is "absolutely identical" in its facts with the facts in this case. As has already been shown, the latter statement was simply that the facts of the case and questions of law involved were the same as those in—

Goodnow vs. Litchfield, 63 Iowa, 275.
Iowa Homestead Co. vs. Des Moines Navigation and Railroad Co., Id., 185.
Goodnow vs. Stryker, 62 Id., 221.

By referring to the decisions in these several cases it will be found that numerous questions were involved and decided by the court. Among others in *Goodnow vs. Stryker* it was held, following *Goodnow vs. Moulton supra*, as follows:

Where one in good faith believing himself to be the owner of land, pays the taxes upon it, and afterward the land is adjudicated to

belong to another, the law raises an implied promise on the part of that other to reimburse the one who has paid the taxes for his benefit, and on such implied promise an action will lie.

Directly contrary, it will be observed, to the holding of this court in *Homestead Co. vs. Valley Railroad Co., supra.*

While in *Iowa Homestead Co. vs. Des Moines Navigation & Railroad Co.* the decision was placed upon the ground that the defendants, though they had in all respects sufficiently set up the former adjudication as a defence, had waived it by failure to rely upon it in their printed brief; for which reason this court reversed the supreme court of Iowa and gave force and effect to the adjudication.

Assuming, as we certainly may, that the opinion or statement of the court, in question, is so lacking in clearness as at least not to be clearly decisive, we claim that the certificate of the chief justice should be conclusive that the decision was upon the federal question made by the defence of former adjudication. The material part of the certificate in this respect is as follows:

> By the answer of the defendants (plaintiffs in error) in their assignment of errors and on the hearing in said cause, defendants claimed immunity from the entire demand and claim of plaintiffs on the ground that as they claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Iowa Homestead Co., by the supreme court of the United States in the case of the *Iowa Homestead Co. vs. The Des Moines Navigation & Railroad Co.*, Wm. B. Wells, Sr., the grantor of these defendants, and others, at the October term thereof, A. D. 1875, and that *our decision herein* was and is *against the immunity so claimed by defendants.*

Had the case been decided without this federal question being in any manner involved, it is difficult to see how it could be properly certified that it was decided "against the immunity so claimed."

In *Adams County vs. B. & Mo. R. R. Co.*, 112 U. S., 123, it is said in the opinion on page 129:

> In the petition which was presented to the chief justice of the court for the allowance of a writ of error, it was stated "that in the pleadings, record and judgment and decree there were drawn in question" the rights of the county under the swamp land acts, as well as the construction of the land grant acts, and that the judgment was against these rights. The chief justice, in his allowance of the writ, certified that he found the statements in the petition to be true; but if this certificate is to have any effect at all upon this question, it certainly cannot be taken as *conclusive*, when the same chief justice in an opinion on file in the case placed the decision entirely on the ground of estoppel.

Where it otherwise appears from the record that a decision involves a federal question, there is no need of a certificate, and if a federal question is not in fact involved a certificate is not only useless but improper, as in that case it would serve no other purpose than to raise an unnecessary doubt.

But while it is stated by the court below in the opinion, that the facts in this case are the same as in the case of *Goodnow vs. Stryker*, it is in effect certified by the chief justice that the only fact upon which the determination of the court in that case depended, is really not in this case at all. The part of the certificate referred to is as follows:

> It is hereby certified and ordered to be made part of the record herein that the facts in this case instead of being the same as in *Goodnow vs. Stryker*, 61 Iowa, 261, *as erroneously stated* in the opinion in this case, filed May 17, 1887, differ from the facts in the Stryker case in this: That, while the answer of the defendants in each of the cases contains the following paragraph: "Said defendants further answering say that all of said taxes mentioned in said petition were duly paid by said Iowa Homestead Company as soon as the same became due, and said defendants are no longer liable therefor—" There was not in the Stryker case any motion or request of any kind for leave to withdraw the same, or any showing or claim that it had been filed by mistake or without authority.

Had not this been deemed by the chief justice, a material difference, it is needless to say that he would not and should not have certified it.

As we will hereafter show, the uncontradicted evidence in support of the motion to withdraw that clause of the answer, was to the effect that the answer was prepared and filed by the attorney without the consent or knowledge of the parties themselves, who, as has already been stated, were only made defendants, and in their character as trustees, on the day when the answer was filed, and at the time two of them were non-residents and absent from the state, and the other one of the three was absent from home.

Second. Should the court be of opinion that it does sufficiently appear from the record that the lower court rested its decision upon the non-federal question of the alleged new promise, we claim that it remains, in the language of this court in *Chapman vs. Goodnow*, *supra*, to consider whether that "was "the real ground of decision and not used to give color only "to a refusal to allow the bar of the decree." Quoting further from the same opinion, we assume the rule to be that —

> If a federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim and avoids all reference to it, is as much against the right, within the meaning of section 709 of the revised statutes, as if it had been specifically referred to and the right directly refused.

The supreme court of Iowa has, to say the least, been exceedingly astute in other similar cases in evading a decision as to the effect of the former adjudication in question.

In *Goodnow vs. Moulton*, 51 Iowa, 451, which was a suit for the recovery of part of the same taxes paid by the Homestead Company, and in which the former adjudication was pleaded, the court in the opinion say:

Something is said in *Homestead Co. vs. Valley Railroad Co.* before cited, which indicates that taxes paid by the plaintiff in that action could not be recovered. If such point was in the case and really determined, it would be an authority in this action. That action was brought to determine the question of title, and we have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show, *with any degree of certainty*, that the question of the right of the plaintiff to recover the taxes paid, was in the case. We infer from what is said by the reporter, that the matter of taxes was only so far involved as the same in a court of equity would affect or bear upon the question of title.

The italics are our own. It is difficult to understand how or why there should have been any uncertainty in the mind of the court as to the question of the right to recover the taxes being in that case.

In the subsequent case of *Goodnow vs. Stryker*, 62 Iowa, 221, admitting their error in *Goodnow vs. Moulton*, the court say on page 223:

It is perhaps not to be denied that, if the court correctly held in that case (*Homestead Co. vs. Navigation & R. R. Co.*) that the Iowa Homestead Company was not entitled to recover for taxes paid, it would follow as a matter of law that the plaintiff in this case is not entitled to recover; but, *since the decision in Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Co. vs. Des Moines Navigation & Railroad Co., et al*, as authority.

That is, they first misunderstand the decision in *Homestead Co. vs. Valley R. R. Co.*, and afterward when they have come to understand it, they refuse to follow it, because of their previous erroneous decision based upon their original misunderstanding of it.

In the still subsequent case of *Iowa Homestead Co. vs. Des Moines Navigation & Railroad Co.* 63 Iowa, 283, it was held that notwithstanding this same former adjudication was pleaded as a defense, and the decision of the lower court overruling it was assigned for error, because the point was

"not presented in the printed brief" of the defendant, though "presented in oral argument," it could not be considered by the supreme court; whereupon, the decision of the lower court was affirmed, the judgment of affirmance appearing from the records to have been upon a non-federal question, as the defense of former adjudication raised the only federal question there was in the case. It thus appeared necessarily to this court in that case, that the decision of the lower court was upon a non-federal question, notwithstanding which the judgment was reversed and effect given to the defense of former adjudication.

And finally, in the case of *Goodnow vs. Stryker*, 61 Iowa, 261, though not pleaded by the defendant in error in the lower court, nor even claimed in argument, and without a particle of testimony, it was held by the court that it did not become necessary to pass upon the question of former adjudication, because of the alleged new promise already referred to as contained in the answer of the defendant in error to the pleading filed in the case by Webster county.

We claim with respect to the non-federal question on which it is claimed that the supreme court of Iowa decided this case:

First. That it was not "within the scope of the pleadings," and was not, therefore, before the court for decision — it was not *in the case.* Before the plaintiff in the court below could rightfully have any benefit from the implied promise arising from the claim made by defendants in their answer, it was necessary he should *plead* the promise, and thereby enable defendants to take issue and by any proper proofs rebut the presumption arising from the answer when unexplained. Let it be conceded that the law would imply a promise of reimbursement from a claim by defendants of the benefit of the payment of the taxes by the Homestead Company, still the paragraph of the answer in question was, at most, only evidence of such a promise; but it was irrelevant to any issue in the case,

and had there been an issue of that kind it would have been open to explanatory proof. Had the claim been made before the commencement of suit, proof of the same could not have been made, it not having been alleged in the petition, and as a subsequently accruing cause of action it could only have been made available by amendment of the petition, and in that case should have been proved by offering that paragraph of the answer in evidence. It might as well be claimed that this court might have rendered judgment for the plaintiff on any other cause of action not declared upon, and upon evidence other than an admission by answer.

In the case of *Goodnow vs. Stryker*, *supra*, this court, we may reasonably infer, was in this respect misled by the following language in the opinion of the lower court, after stating that the defendant, as one of his defenses, pleaded the former adjudication:

> *To this plea the plaintiff replies*, in substance, that if it should be considered that the court made an adjudication in that case denying the right of recovery for the taxes in question in this case, yet this action is not barred *because a right of recovery has arisen since that time.*

Whatever the fact was in that case, certain it is that no such reply was filed in this, and if there was in that it would be another fact clearly and materially distinguishing that case from this.

The decree of a court in a case like this, on a question not within the scope of the pleadings, is a mere nullity, as there is nothing in the record to support it.

In 2 Daniels Chy. Practice, 1003, note 6, it is said:

> A decree must be founded on, and sustained, by both the allegations and the proofs in the case, and it cannot be based on a fact not put in issue by the pleadings.

And, in 1 Id., 853, note 5, it is said:

> Proofs taken in a cause must be pertinent to the issue in that cause, *secundum allegata*. * * * Evidence relative to matter not stated in the pleadings nor fairly within their general allegations, is impertinent and cannot be made the foundation of a decree. A decree entirely outside of the issue raised in the record is *corum non judice*, and will be so adjudged even when assailed in a collateral proceeding.

In *Windsor vs. McVeigh*, 18 Wall., page 283, it is said:

> The decree of a court of equity upon oral allegations without written pleadings, would be an idle act of no force beyond that of an advisory proceeding of the chancellor.

In the case of *Graham vs. Railroad Co.*, 3 Wall., 712, the court, reviewing cases that had been cited, say:

> But neither of these cases asserts the doctrine maintained here for appellants, that a court of equity may decree between defendants when neither pleadings nor proof show any controversy or adverse interest between them; nor have we been referred to any case which does assert that doctrine.

In *Barnes vs. Chicago, etc., Railway*, 122 U. S., 1, it is said on page 14:

> Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purpose of the case that has been made and the issues that have been decided.

Second. It was shown by the uncontradicted affidavits of the attorney, Theodore Hawley, and Woolsey Wells, the resident defendant, filed in support of the motion to withdraw the paragraph of the answer in question, that the answer was prepared and filed by the attorney without the authority or knowledge of any one of the defendants. Under section 2913 of the Code of Iowa these affidavits were competent evidence.

So much of the section as is material is as follows:

2913. Testimony to sustain or resist a motion may be in the form of affidavits, or in such other forms as the parties may agree on or the court or judge direct.

It is a matter of no consequence what became of the motion after the affidavits had been filed and became part of the record. Had a ruling upon it been expressly waived it would still have remained a fact in the case established by these uncontradicted affidavits that the defendants so far from having authorized the making of the same, were not even cognizant of the fact of the claim relied upon as constituting the alleged promise having been made by their attorney. It was necessary, by some means, to get a disclaimer of the unauthorized act of the attorney into the record, and the filing of the motion with the supporting affidavits was a legitimate, if not the only legitimate, method of doing so. An amendment to the answer might have been filed, in terms withdrawing the objectionable paragraph, but its effect as a promise could not have been so withdrawn; besides, such an amendment, though sworn to, would not, under a provision of the Iowa code, have been any evidence whatever of the truth of the allegations contained in it. Upon the pleadings as they stood, defendants would not, on the hearing, have had the right to introduce evidence contradicting or explaining their answer, and plaintiff having failed after the filing of the answer to tender any new issue based upon it, how, otherwise than by the course adopted, was it possible for them to protect themselves against the unauthorized act of their attorney.

It does not appear from the record what ruling, if any, was made upon the motion, nor is it material that it should, since neither an order sustaining nor overruling it would have determined whether or not the pleading in question did or did not in law constitute a new promise. In either event, the plaintiff

might, by amendment to his petition, have set up and relied upon it as a new promise, without prejudice from such prior ruling either way.

Third. The unsworn answer of the attorney was not competent evidence as against his client.

In 1 Wharton Ev. (2d ed., sec. 838) it is said:

> It is proper to add at this place that the pleadings of a party in one suit may be used in evidence against him in another, not as estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts. *But in order to bring such admission home to him, the pleading must be either signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts.* Yet even if such admissions are thus brought home to the party, they are entitled to little weight. At the time they were made they were self serving, not self disserving; as a matter of practice, pleadings are often framed by counsel rather to put an issue in shape than to exhibit the client's actual standpoint as to particular facts; and even where the client signs such papers he does so as a matter of mere form.

We can see no difference in principle between the averments of an unsworn answer and those of a bill in equity.

In 1 Green. Ev. (15th ed.), in a note to section 551, it is said:

> The bill is not evidence against the party in whose name it is filed until it is shown that he was privy to it. When this privity is established, the bill is evidence that such a suit was instituted, and of its subject matter; but not of the plaintiff's admission of the truth of the matters therein stated unless it were sworn to.

In *Durden vs. Cleveland*, 4 Ala., 225, it is said in the opinion:

> The established rule is now to consider a bill in equity as the mere allegations of counsel, unless the party is connected with it by proof showing a recognition of its contents as would be the case if the bill was verified by the complainant's oath. It is possible other modes of recognition might be shown, but we need not examine this subject further, as there is no pretense of any recognition of the bill.

In *Doe, ex dem. vs. Syborm*, 7 Term R., 1, a bill in chancery was offered in evidence to prove a fact therein alleged, and Lord Kenyon "rejected the evidence, on the ground that a bill "in chancery was not evidence of any fact therein contained, "but was to be taken as the *suggestions of counsel.*"

Other cases might be cited, but as there is no conflict of authority on the question it is needless to do so.

Fourth. It was not within the competency or authority of the trustees to assume any such obligation, thereby casting upon the *cestui que* trust the burden of paying a large amount of money, for the payment of which he was under no legal liability whatever.

It is true that all of these last suggested questions are non-federal questions, but we refer to them as showing how many other erroneous decisions would have been involved in resting the judgment of the lower court upon the non-federal question of the alleged new promise.

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